EDITOR'S NOTE

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Title: School Board of Nassau County, Florida and Craig Parsh, Individually and as Superintendent of Schools of Nassau County, Florida, Petitioners
v.
Gene H. Arline

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Hayes,Brian Thomas

Counsel for respondent: Rahdert,George K.

try	Date	Note	Proceedings and Orders
1	Jan 27 1986	G	Petition for writ of certiorari filed.
2	Feb 26 1986		Brief of respondent Gene H. Arline in opposition filed.
3	Feb 26 1986	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Mar 5 1986		DISTRIBUTED. March 21, 1986
6	Mar 24 1986		REDISTRIBUTED. March 28, 1986
8	Mar 29 1986		Reply brief of petitioner Sch. Bd. of Nassau Cty., FL filed.
9	Mar 31 1986		REDISTRIBUTED. April 4, 1986
1	Apr 7 1986		REDISTRIBUTED. April 18, 1986
2	Apr 21 1986		Motion of respondent for leave to proceed in forma pauperis GRANTED.
3	Apr 21 1986		Petition GRANTED. Dissenting opinion by Justice Stevens. (Detached opinion.)
			**********
5	May 23 1986		Order extending time to file brief of petitioner on the merits until July 5, 1986.
6	Jun 25 1986		Order further extending time to file brief of petitioner on the merits until July 12, 1986.
7	Jul 5 1986		Joint appendix filed.
8	Jul 7 1986		Brief amicus curiae of Wm. Dannemeyer, et al. filed.
9	Jul 9 1986		Record filed.
J	Jul 9 1986		Certified copy of original record and proceedings, 3 volumes, received.
1	Jul 11 1986		Brief amicus curiae of Equal Employment Advisory Council filed.
2	Jul 10 1986		Brief of petitioner Sch. Bd. of Nassau Cty., FL filed.
3	Jul 11 1986		Brief amicus curiae of American Medical Assn. filed.
4	Jul 12 1986		Brief amicus curiae of National School Boards Assn. filed.
7	Jul 12 1986		Brief amicus curiae of United States filed.
8	Jul 24 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
U	Jul 29 1986		Order extending time to file brief of respondent on the merits until September 12, 1986.
1	Sep 5 1986		Order further extending time to file brief of respondent on the merits until September 19, 1986.
2	Sep 16 1986		Brief amicus curiae of California, et al. filed.
3	Sep 19 1986		Brief amicus curiae of Employment Law Center, et al. filed.
4	Sep 19 1986		Brief amicus curiae of Epilepsy Foundation of America filed.
5	Sep 19 1986		Brief amicus curiae of Senators Cranson, et al. filed.

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try	Date	Note	Proceedings and Orders
6	Sep 19 1986		Two sets of lodgings received, 9 copies each. (Box).
8	Sep 24 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
9	Sep 19 1986		Brief amicus curiae of American Public Health Assn., et al. filed.
0	Sep 19 1986		Brief amicus curiae of Doctors for AIDS Research, et al. filed.
2	Sep 19 1986		Brief amicus curiae of Assn. for Retarded Citizens, et al. filed.
3	Sep 19 1986		Brief of respondent Gene H. Arline filed.
4	Oct 6 1986		SET FOR ARGUMENT. Wednesday, December 3, 1986. (1st case) (1 hour).
5	Oct 10 1986		CIRCULATED.
6	Oct 14 1986	D	Motion of respondent for divided argument to permit American Public Health Association to present oral argument as amicus curiae filed.
8	Nov 3 1986		Motion of respondent for divided argument to permit American Public Health Association to present oral argument as amicus curiae DENIED.
9	Nov 25 1986	X	Reply brief of petitioner Sch. Bd. of Nassau Cty., FL filed.
0	Dec 3 1986		ARGUED.

Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

85 - 1277

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE SCHOOL BOARD OF NASSAU COUNTY, FLORIDA; and CRAIG MARSH,
Individually and as Superintendent of Schools of Nassau County, Florida,

Petitioners,

---vs.---

GENE H. ARLINE,
Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Brian T. Hayes
245 East Washington Street
Monticello, Florida 32344
904-997-3526

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904-877-7191

ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

1. Whether the contagious, infectious disease of Tuberculosis constitutes a handicap within the meaning of Title 29, U.S.C.A. 701, et seq. (Section 504, Rehabilitation Act of 1973).

2. Whether the receipt of miniscule Federal financial aid, i.e. less than three-tenths of one per cent of the entire budget, by a public employer pursuant to 20 U.S.C. Section 237 is sufficient to invoke jurisdiction under Title 29, U.S.C.A. 701, et seq. (Section 504, Rehabilitation Act of 1973.).

3. Whether the Eleventh Amendment to the United States Constitution bars an action against a school board in Florida, under Section 504, Rehabilitation Act of 1973.

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Appendix B: Order of the Court of Appeals on Denial of Petition for Rehearing and Suggestion for Rehearing En Banc

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Gene H. Arline v. School Board of Nassau County, et al., 772 F.2d 759 (1985)

Eleventh Circuit

GROUNDS ON WHICH JURISDICTION IS INVOKED

On September 30, 1985, the Eleventh Circuit Court of Appeals reversed the Final Judgment of the District Court for the Middle District of Florida. Petition for Rehearing and Suggestion for Rehearing, En Banc, were denied on November 8, 1985.

This Court has jurisdiction in its discretion to grant a Writ of Certiorari because the Eleventh Circuit Court of Appeals, by its decision, has held for the first time that the provisions of Section 504, Rehabilitation Act, 29 U.S.C.A. 701, apply to contagious diseases including Tuberculosis. Further, the Court held that Federal impact aid, amounting to three-tenths of one percent of the School District's budget, is sufficient to render the entire school system subject to the provisions of the Act.

STATUTORY PROVISIONS BELIEVED TO CONFER ON THE SUPREME COURT JURISDICTION TO REVIEW THE JUDGEMENT BY WRIT OF CERTIORARI

1. 28 U.S.C.A. 1254
2. Rule 17(c), Supreme Court Rules

STATUTES (IN PERTINENT PARTS) CONSIDERED BY THE COURT BELOW AND WHICH BEAR SIGNIFICANCE TO THIS PETITION

29 U.S.C.A. 794, Section 504 Rehabilitation Act of 1973:

> No otherwise qualified handicapped individual...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..."

Amendment 11 Suits against States - Restriction of Judicial Power:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

20 U.S.C.A. 237:

> (a) Where the Commissioner, after consultation with any local educational agency and with the appropriate State educational agency, determines for any fiscal year ending prior to July 1, 1978-
>
> (1) that the United States owns Federal property in the school district of such local educational agency, and that such property (A) has been acquired by

> the United States since 1938, (B) was not acquired by exchange for other Federal Property in the school district which the United States owned before 1939, and (C) had an assessed value (determined as of the time or times when so acquired) aggregating 10 per centum or more of the assessed value of all real property in the school district (similarly determined as of the time or times when such Federal property was so acquired); and
>
> (2) that such acquisition has placed a substantial and continuing financial burden on such agency; and
>
> (3) that such agency is not being substantially compensated for the loss in revenue resulting from such acquisition by increases in revenue accruing to the agency from the carrying on of Federal activities with respect to the property so acquired, then the local educational agency shall be entitled to receive for such fiscal year such amount as, in the judgment of the Commissioner, is equal to the continuing Federal responsibility for the additional financial burden with respect to current expenditures placed on such agency by such acquisition of property. Such amount shall not exceed the amount which, in the judgement of the Commissioner, such agency would have derived in such year, and would have had available for current expenditures, from the property acquired by the United States (such

amount to be determined without regard to any improvements or other changes made in or on such property since acquisition).

STATEMENT OF THE CASE

Petitioners were the defendants in an action brought by GENE H. ARLINE in United States District Court, Middle District of Florida, Jacksonville Division. Arline was a tenured teacher with the Nassau County School Board and was terminated because of her chronic susceptibility to infectious Tuberculosis. Prior to this action, she had unsuccessfully challenged the dismissal through the state courts of Florida.[1]

The cause came on for trial on November 17, 1983. The District Court heard the testimony of Dr. Marianne McEuen, M. D., a physician specializing in Tuberculosis, who testified that Respondent had been diagnosed as having Tuberculosis. She also described the characteristics of that disease. Her testimony established that Tuberculosis is an infectious disease which is capable of being transmitted from one individual to another by means of breathing, coughing, sneezing, or other respiratory activity. Dr. McEuen further testified that while young children are particularly susceptible to the disease, all persons are capable of contracting it when exposed to a person who is infectious. (App. E) Following the nonjury trial, John H. Moore, II, District Judge, ruled for the defendants on all issues. (See Appendix C) An appeal to the Eleventh Circuit Court of Appeals followed.

[1] School Board of Nassau County v. Arline, 408 So.2d 706 (Fla. 1st DCA 1982).

On appeal, the decision of the lower court was reversed. (See *Arline v. School Board of Nassau County,* 772 F.2d 759) In its reversal, the court found jurisdiction existed because the School Board received Federal impact aid funds and further found that Tuberculosis was a "handicap" within the meaning of *Section 504, Rehabilitation Act of 1973, 29 U.S.C.A. 701,* et seq. Petetition for Rehearing was timely filed and denied on November 8, 1985.

Oral argument on the case below was held on February 4, 1985. *Atascadero State Hospital v. Scanlon,* 87 L. Ed. 2d 171, was decided by this Court on June 28, 1985.

REASONS FOR GRANTING THE WRIT

POINT I

DOES THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS CONSTITUTE A HANDICAP WITHIN THE MEANING OF TITLE 29 U.S.C.A. 701, et. seq, (Section 504, Rehabilitation Act of 1973)

The Court of Appeals' decision below significantly extended the scope of Section 504 of the Rehabilitation Act of 1973 beyond that which had been established by previous decisional law. Because of the far-reaching implications of the Court of Appeals' decision, both in terms of what "programs or activities" are subject to the reach of Section 504, as well as the holding that individuals suffering from infectious, contagious diseases are "handicapped individuals" protected thereby, it is respectfully submitted that this Court should exercise its discretion to review the decision of the Court of Appeals and render a definitive ruling of the issues presented in this case.

Although the courts have admittedly construed the term "handicapped individual" as used in Section 504 in a broad manner so as to include individuals with a wide variety of physical and mental impairments,[1] no judicial decision prior to that of the Court of Appeals in the

[1] *See, e.g., Southeastern Community College v. Davis,* 442 U.S. 397 (1979) (hearing impairments); *Brown v. Sibley,* 650 F.2d 760 (5th Cir. 1981) (blindness); *Beutivegna v. U.S. Department of Labor,* 694 F.2d 619 (9th Cir. 1982) (diabetes); *Stutts v. Freeman,* 694 F.2d 666 (11th Cir. 1983) (dyslexia); *Kling v. County of Los Angeles,* 633 F.2d 876 (9th Cir. 1980) (Crohn's disease); *Treadwell V. Alexander,* 707 F.2d 473 (11th Cir. 1983) (heart condition); *Doe v. Region 13 Mental Health-Mental Retardation Commission,* 704 F.2d 1402 (5th Cir.. 1983) (depression); *Gladys J. v. Pearland Ind. School Dist.,* 520 F. Supp. 869 (S.D. Tex. 1981) (schizophrenia); *Halderman v. Pennhurst State School & Hosp.,* 446 F. Supp. 1295 (E.D. Pa. 1978) (retardation).

instant case had ever construed that term as including an individual afflicted by a contagious disease. Thus, in holding that Respondent's Tuberculosis constituted a "handicap" within the meaning of the Act, the Court of Appeals did not rely on any prior decisional authority. Instead, the Court of Appeals focused on the definitions of a "handicapped individual" as contained in applicable statutes, 29 U.S.C Section 706(7)(B) and regulations, 45 C.F.R. Section 84.3(j). The Court of Appeals was of the view that Respondent's condition fell "so neatly within the statutory and regulatory framework" that it was obligated to hold that Respondent's Tuberculosis constituted a handicap unless there was an express "legislative direction" to the contrary. 772 F.2d at 763-64. Finding no such direction, the Court of Appeals held that Respondent's tuberculosis did constitute a "handicap" and that Respondent was thereby entitled to the protections of the Act.

The Court of Appeals' decision did not suggest that an employer subject to the Act could never make employment decisions on the basis of an individual's being afflicted with a contagious disease. Thus, the Court of Appeals' decision left open the possibility that such a disease might render the affected individual not "otherwise qualified" for particular jobs within the meaning of the Act. However, the Court of Appeals' decision requires that an employer must, prior to making such a determination, attempt to provide "reasonable accommodation" to the individual in an attempt to render the individual employable "in some . . . kind of position" with the employer. 772 F.2d at 764-65.

It is submitted that the Court of Appeals' decision in

this respect was based upon an erroneous view of the Act and would create disastrous consequences if widely applied to public and private employers subject to the Act. For one thing, the Court of Appeals' view that contagious diseases fit "neatly within" the statutory and regulatory framework is erroneous, insofar as these "frameworks," as well as all prior decisions construing them, appear to focus primarily upon conditions which render a person unable to perform the essential functions of a job, or which are perceived as having such an effect. Thus, the statute defines a "handicap" as a *"physical or mental impairment* which *substantially limits* one or more . . . *major life activities."* 29 U.S.C. Section 706(7)(B) (emphasis added). This definition clearly indicates that in proscribing employment discrimination against the handicapped, Congress was primarily concerned with individuals whose *mental or physical capabilities* rendered them unable to perform certain "routine" tasks or activities, or who were perceived or regarded as having such limited abilities. This court has said that the Act is intended to protect handicapped individuals who are qualified "in spite of" their handicaps. *Southeastern Community College v. Davis,* 442 U. S. 397, 406 (1976).

Further, whether an individual is to be considered as "qualified" under the Act depends on whether such individual can, with or without reasonable accommodation,

> *perform the essential functions* of the position in question *without endangering the health and safety* of the individual or others.

Prewitt v. United States Postal Service, 662 F.2d 292, 310 (5th Cir. 1981) (emphasis added). Thus, it is clear that the primary emphasis of the statutory and regulatory definitions of a "handicapped individual" is upon persons with impaired *physical or mental abilities,* while the same authorities define a "qualified handicapped individual" as one who is *able* to safely and adequately perform the requirements of a job *despite* his handicap.

Similarly, prior case law regarding the sort of "reasonable accommodation" that is required of an employer also indicate an intention to limit the concept of a "handicap" to conditions which restrict an individual's ability to function in a job or other "activity." Thus, the concept of "reasonable accommodation" has principally been applied in the sense of requiring an employer to *restructure the requirements* of the job (or environment in which the job is to be performed) so that the handicapped individual might be better able to satisfy those requirements. *See,* 45 *C.F.R.* Section 84.12(b); *Gardner v. Morris,* 752 F.2d 1271, 1280 (8th Cir. 1985).

In short, contrary to the views of the Court of Appeals below, the "statutory and regulatory" framework of the Act, as well as the cases previously construing the Act, have limited the concept of a "handicap" to physical and mental conditions which result in either a real or perceived diminution of an individual's capabilities. These authorities require an employer to make reasonable efforts to accomodate the requirements of a job to a handicapped individual's abilities, and to treat in a nondiscriminatory fashion those individuals who are able, either with or

without such accommodation, to perform the requirements of the job without endangering themselves or others.

The decision of the Court of Appeals below, by holding that a contagious disease is, without more, a "handicap," has undertaken a radical departure from all previous interpretations of the statutory and regulatory framework. The policy considerations involved in the context of a contagious disease differ markedly from those involved in the case of most "handicaps." For one thing, an individual suffering from a contagious disease may not necessarily suffer from any physical or mental impairments affecting his ability to perform the job in question. In other words, an employer's reluctance to hire such an individual is not due to any real or perceived inability on the individuals' part, but rather because of the employer's reluctance to expose its other employees and its clientele to the threat of infection.

Admittedly, safety considerations may also be involved in the case of a handicapped individual with physical or mental limitations. However, *the "danger" in such cases arises from the handicapped individual's inability to perform the requirements of the job.* Where "reasonable accommodation" can result in the individual being better able to fulfill the job requirements (as modified), then the individual may be fairly considered as fully "qualified" for the job, and thus entitled to the protection of the Act.

However, in the case of individuals with contagious diseases, such as Respondent, the safety considerations are

quite different. They arise not from any inability (real or perceived) of the handicapped individual to perform the essential functions of the job, but instead from that individual's mere presence on the job site. Thus, the danger cannot be eliminated or minimized through "reasonable accommodation" in the form of requirements of the job, because the danger in such cases does not arise from the handicapped individual's inability to perform those requirements in the first place.

Indeed, the decision of the Court of Appeals below seems to contemplate a different sort of attempt to "reasonably accommodate" Respondent. The Court of Appeals indicated that even if Respondent were not "otherwise qualified" for her elementary school teaching position (due to the safety considerations involved) it might nevertheless be possible to "accommodate" her by placing her in "some other kind of position" in which she would be exposed to "less susceptible individuals." 772 F.2d at 765.

It is submitted that Congress never contemplated such an "accommodation" whereby an employer is required to pick and choose from among its employees those to whom it is "acceptable" to expose to a such health risks. The sort of accommodation suggested by the Court of Appeals could never result in a total elimination of the health risks, but would only achieve a shifting of that risk from one group of persons to another. Futher, it could never be known with certainty whether such an "accommodation" was successful in eliminating the risk of

spreading a contagious disease unless and until someone else contracted the disease.

The concept of "reasonable accommodation" in the context of handicapped individuals with impaired physical or mental abilities represents an attempt to achieve a compromise between the legitimate interests of employers and other recipients of federal funds subject to the Act, and the objective of Congress to integrate handicapped individuals into the mainstream of society when possible. However, this court has stated that the duty of reasonable accommodation does not obligate a recipient of federal funds to make "fundamental" or "substantial" modifications to its programs which would "compromise the essential nature" of the program. *Alexander v. Choate,* ___U.S.___, 105 S. Ct. 712, 720 (1985) *citing, Southeastern Comminuty College v. Davis,* 442 U.S. 397 (1979). The decision of the Court of Appeals in this case imposes precisely such an obligation, by demanding a form of "accommodation" which requires the Petitioner School Board to disregard the very health risk which led to its reluctance to continue Respondent's employment in the first place.

There is no indication in the statutory framework of the Act which indicates that Congress intended to require federal recipients subject to the Act to compromise the health and safety of their non-handicapped employees by attempting to accommodate those who cannot be safely and fully accommodated. To the contrary, Congress in one instance chose to specifically exclude from the definition of "handicapped individuals" alcoholics and drug

abusers whose current use of alcohol or drugs would constitute a direct threat to the safety of others. 29 U.S.C. Section 706(7)(B). (Such individuals, it should be observed, are similar to persons with contagious diseases insofar as the threat presented by alcoholics or drug abusers is unavoidable to the extent that such individuals are unwilling to cooperate in their own treatment.) The Court of Appeals, however, did not view this exemption as evidencing a Congressional intent to exclude from the coverage of the Act individuals with contagious diseases (who also present health risk which are not entirely avoidable), but to the contrary, found that Congress' failure to specifically exclude contagious diseases at the same time it dealt with alcoholics and drug abusers implied that Congress "harbored no similar disapproval" about contagious diseases. 772 F.2d at 764.

This view overlooks the fact that, in enacting the 1978 amendments to the Act [29 U.S.C. Section 706(7)(B)] which excluded alcoholics and drug abusers (Pub. L. No. 95-602, Section 122), Congress was obviously reacting specifically to a 1977 Attorney General's Opinion which had indicated that alcoholics and drug abusers were "handicapped individuals" within the meaning of the Act. 43 Op. Att'y Gen. 12 (1977). Thus, contrary to the Court of Appeals' view, the exclusion of alcoholics and drug abusers does indicate a Congressional reluctance to require employers to accommodate those whose handicap cannot be safely accommodated, and Congress' failure to specifically exclude contagious diseases from the definition of a handicap should properly be viewed in the

perspective of its reaction to a specific need.

In short, the Court of Appeals' decision that individuals with contagious diseases are "handicapped individuals" protected by the Act constitutes a dramatic expansion of the scope of the Act beyond its literal terms as well as prior judicial decisions construing it. The decision of the Court of Appeals has far-reaching implications insofar as it constitutes a precedent that all individuals with any form of contagious disease (including Acquired Immune Deficiency Syndrome and other fatal diseases) are protected by the Act. Further, the concept of "reasonable accommodation" expressed in the Court of Appeals' decision would require employers subject to the Act to compromise the safety of their employees and clientele by exposing some of those persons to the threat of contracting contagious diseases whenever the risk of contracting such disease may be characterized as "minimal," and thus presumably "acceptable." It is respectfully submitted that this Court should accept jurisdiction of this case in order to issue a definitive ruling as to whether an individual who has been shown to be suffering from a contagious disease, which is capable of being spread to anyone, is in fact a "handicapped individual" within the meaning of the Act.

POINT II

IS THE RECEIPT OF MINISCULE FEDERAL FINANCIAL AID, i.e. LESS THAN THREE-TENTHS OF ONE PER CENT OF THE ENTIRE BUDGET, BY A PUBLIC EMPLOYER PURSUANT TO 20 U.S.C. SECTION 237 SUFFICIENT TO INVOKE JURISDICTION UNDER TITLE 29, U.S.C.A. 701, et seq. (Section 504, Rehabilitaion Act of 1973.)

The decision of the Court of Appeals merits this Court's review in another respect. The Court of Appeals' decision that the "impact aid" received by the Petitioner School Board (although amounting to only 0.3% of its entire budget) was sufficient to render *all* of the Board's activites subject to Section 504 coverage constitutes a dramatic expansion of the concept of "Federal financial aid" over that expressed in previous decisions construing Section 504 and similar statutes. This aspect of the Court of Appeals' decision, if allowed to stand, would result in subjecting a substantial number of school districts to Section 504 coverage, even though the "impact aid" received by such districts may be miniscule (as in the present case), and even though such aid is not provided in order to finance any particular "program or activity," but instead consist of non-earmarked funds provided in order to compensate the school district for local taxation revenues it has lost as a result of tax-exempt federal land in the district. 20 U.S.C. Section 237.

This Court has held that coverage under Section 504 is program-specific. *Consolidated Rail Corp. v. Darrone,* 465 U.S. 624, 104 S.Ct. 1248, 1255 (1984). Further, this Court has indicated that under Title IX, which contains the same "program or activity" coverage as Section 504, the fact that federal funds issued for one purpose ultimately find their way into a budget which funds a separate and

distict "program or activity" is not sufficient to subject that program or activity to Title IX coverage. *Grove City College v. Bell,* ___ U.S. ___, 104 S.Ct. 1211, 1221 (1984).

The provisions of 20 U.S.C. Section 237 make it abundantly clear that the purpose of "impact aid" under that statute is to compensate local school districts for local tax revenues the districts have lost due to the presence of tax-exempt, federally owned land in the district. Several cases have held that payments made by the federal government to compensate an entity for obligations it has incurred while acting on behalf of the federal government do not constitute "Federal financial assistance" within the meaning of Section 504. *Jacobson v. Delta Airlines, Inc.,* 742 F.2d 1202, 1209 (9th Cir. 1984) ("compensatory" payments under contract for carriage of mail); *Hingson V. Pacific Southwest Airlines,* 743 F.2d 1408, 1414 (9th Cir. 1984) (same); *Ferris v. University of Texas at Austin,* 558 F.Supp. 536, 543 (W.D. Tex. 1983) (unrestricted funds intended to compensate university for costs incurred in administering federally-funded programs did not constitute "Federal financial assistance" to other programs, even though commingled with student service fees in university's general operating budget). Yet the Court of Appeals in the instant case reached a contrary result, holding that the "impact aid" did constitute "Federal financial assistance" sufficient to trigger Section 504 coverage, notwithstanding its compensatory purpose. This is the first decision to so characterize impact aid as "financial assistance" for Section 504 purposes, and accordingly

would significantly expand the scope of Section 504 coverage over that established by prior case law, since a substantial percentage of the nation's school districts receive impact aid in some amount.

Had Congress chosen to do so, it could have provided that *all employers* whose businesses "affected" interstate commerce would be subject to compliance with Section 504. However, Congress deliberately chose not to provide such expansive coverage for Section 504, but instead limited its application to "program[s] or activit[ies] receiving Federal financial assistance." This decision, it is submitted, reflects a Congressional intention that Section 504 coverage should not extend to every case in which an employer may receive federal funds, but should instead be based upon a sort of contractual understanding. Thus, when the federal government grants funds to a local government or a private entity for the purpose of financing a particular program or activity, and the recipient of the funds willingly accepts them, then Section 504 coverage is properly imposed on the program or activity receiving the funds because both parties fully understood that the receipt of the funds would lead to coverage. Where, however, the federal government (as in this case) provides non-earmarked "replacement dollars" to compensate a school district for revenues it has lost as a result of federal ownership of property in the district, and allows the district to use those funds wherever it sees fit to do so, the district has never been given fair notice that it will be subject to Section 504 coverage, nor has it agreed to be so covered.

The Court of Appeals' finding that impact aid is sufficient to trigger Section 504 coverage is unrealistic in another sense as well. If, as the Court of Appeals held, the acceptance of such aid gives rise to a duty to act in compliance with Section 504, then this duty could be avoided by the simple expedient of a school district's declining to accept the federally-funded monies. Thus, it is unrealistic to assume that Congress would have relied upon the acceptance of impact aid as a mechanism for compelling compliance with Section 504, because a school district would have the unilateral power to avoid such compliance by the simple device of deciding to forego the aid. *See, Paralyzed Veterans of America v. Civil Aeronautics Board,* 752 F.2d 694, 709 (D.C. Cir.), *cert. granted,* ____ U.S. ____, 54 U.S.L.W. 3262 (Oct. 21, 1985). A substantial number of school districts would opt for such an alternative, it is believed, should the decision of the Court of Appeals below be allowed to stand.

The Court of Appeals' holding would have the effect of simply subjecting *all activities* of such school districts to Section 504 coverage, contrary to this court's mandate that the Act be construed in a program-specific manner. *Consolidated Rail Corp. v. Darrone, supra.* As indicated earlier, this court has recently agreed to review a Court of Appeals decision which appears to have diverged from that mandate, *Paralyzed Veterans of America v. Civil Aeronautics Board, supra,* and it is respectfully urged that the Court should do so again in order to review the decision of the Court of Appeals in the instant case.

POINT III

IS THE SCHOOL BOARD IMMUNE UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO AN ACTION BROUGHT IN FEDERAL COURT UNDER THE REHABILITATION ACT OF 1973

Subsequent to the decision by the trial court on November 17, 1983, and subsequent to oral argument and briefing before the Eleventh Circuit, this Court decided the case of *Atascadero State Hospital v. Scanlon,* 87 L. Ed 2d 171, on June 28, 1985. In that case, the Court held that absent a state's consent to waive its constitutional immunity and absent unequivocal congressional intention, the Eleventh Amendment bars suits in Federal Court against states. A District School Board in Florida is a direct branch of the State of Florida because of the unique funding scheme existing in Florida. (See *Adkins v. Duval County School Board,* 511 F.2d 690 CA5.)

Clearly, neither the parties nor the trial court below had the benefit of *Atascadero,* supra, at the time this case was tried. Nor is *Atascadero,* supra, included in the Brief on appeal because of the chronology previously referred to, although the Eleventh Circuit Court of Appeals, prior to denial of rehearing, was made aware of *Atascadero,* supra, by counsel for Petitioner. (See Appendix D) The Court's pronouncement in the *Atascadero,* supra, case clearly bars the instant action against the School Board.

Petitioners are not unaware of the case of *Campbell v. Gadsden County District School Board,* 534 F.2d 650 (5th DCA, 1976). However, since the issue of whether or

not a state agency has Eleventh Amendment immunity is a question of fact, Petitioners suggest the Court, if certiorari is granted, should remand this matter to the District Court for an evidentiary hearing to determine who would pay any sums found to be due. If, indeed, the funds to defray such an award would be derived from the state treasury, in that event, Petitioners suggest the *Atascadero,* supra, rationale would bar this claim. See *Adams v. Rankin County Board of Education,* 524 F.2d 928, (5th Cir., 1975).

In conclusion, Petitioners suggest that certiorari should be granted and this cause remanded to the District Court for an evidentiary hearing and briefing to determine to applicability of the *Atascadero,* supra, holdings to the facts in the instant case.

Respectfully Submitted

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By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petition For Writ Of Certiorari was furnished by U. S. mail to Steven H. Malone, Attorney for the Respondent this 27th day of January, 1986.

_____
Brian T. Hayes

Appendix A

ARLINE v. SCHOOL BD. OF NASSAU COUNTY

Gene H. ARLINE, Plaintiff-Appellant,

v.

The SCHOOL BOARD OF NASSAU COUNTY: and Craig Marsh, Individually and as Superintendent of Schools of Nassau County, FL, Defendants-Appellee.

Nos. 83-3754, 84-3307.

United States Court of Appeals,
Eleventh Circuit,
Sept. 30, 1985.

(Syllabus Omitted)

VANCE Circuit Judge:

In enacting the Rehabilitation act of 1973, Congress designed a comprehensive federal program aimed at integrating the handicapped into this society and affording them greater access to its benefits. One of the enforcement mechanisims of that Act is the private right of action[1] which arises out of its antidiscrimination provision. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, provides that.

> No otherwise qualified handicapped individual...shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...

[1]This court has concluded that section 504 creates a private right of action. *Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1377 n. 1 (11th Cir.1982), cert. denied, — U.S. — , 104 S.Ct. 1591, 80 L.Ed.2d 123 (1984).

In the appeal before us the plaintiff, a third grade teacher who was fired from her job solely because of her susceptibility to tuberculosis, alleges that her dismissal violated section 504. Our consideration of her claim requires us to construe the meaning of three essential terms in section 504, namely, "handicapped individual," "otherwise qualified"[2] and "federal financial assistance."

I

Mrs. Gene Arline first contracted tuberculosis in 1957 at the age of fourteen after which the disease went into remission. In 1966 she was hired as an elementary school teacher in Nassau County, Florida, and did her job competently for thirteen years. Arline then suffered three relapses of tuberculosis, one in 1977 and two in 1978. After her third relapse the School Board dismissed Arline from her job.

After being denied relief in state administrative proceedings, Arline brought suit in federal court alleging that her dismissal constituted a violation of section 504 of the Rehabilitation Act.[3] She contended that her susceptibility to tuberculosis made her a "handicapped individual" within the meaning of the Rehabilitation Act, and that the school board therefore violated section 504 because it had fired her even though she was "otherwise qualified if given

[2]The regulations promulgated under section 504 have limited the broad scope of the phrase "otherwise qualified" to cover handicapped persons who would be qualified for a specific job if given "reasonable accommodation" by the employer. *See* 45 C.F.R. Section 84.3(k)(l). For futher discussion, see part IV *infra*.

[3]The plaintiff also brought a claim under 42 U.S.C. Section 1983, alleging that she was denied due process under the fourteenth amendment. We reject this argument on the grounds articulated by the district court in its oral opinion:

> The plaintiff had at least one hearing and then a second hearing before the school board, then had a hearing before the Board of Education, State Board of Education, and then the matter was appealed pursuant to the administrative practices act of the State of Florida, chapter 120 of the Florida Statute, and the First District Court of Appeal ruled against her. In doing so, the Court of Appeal discussed the contract issue that was involved there and gave an interpretation of the contract provision, which provided that...the contract was continuing unless the individual who had executed the contract was unable to perform duties because of illness.
> ...I see no denial of due process, either procedural or substantive with regard to that decision or the action of the school board of Nassau County in that respect.

reasonable accommodation." Arline's first theory was that her handicap created no barrier at all to her continued employment because the risk that she would infect her students was so minimal. The descision to dismiss her because of it was thus unreasonable and discriminatory. In the alternative, she claimed that even if nonsusceptibility to tuberculosis was a necessary physical qualification for teaching small children, the school district should have offered her "reasonable accommodation" in the form of an administrative job or a temporary position teaching less susceptible persons such as older students or adults until she could obtain certification in areas outside elementary education.[4]

Along with medical evidence to support her claims, Arline introduced evidence that the school system received two forms of federal assistance. The first source of federal funds was Title I of the Elementary and Secondary Education Act, 20 U.S.C. Sections 2701-2854,[5] which provided monies to schools attended by significant numbers of children from low-income families. Although those funds were segregated from the general budget and used to pay only Title I teachers' salaries and purchase only Title I program supplies, she pointed out that her job entailed significant involvement with the Title I program in the form of day-to-day conferrals with Title I teachers about those of her students who were involved in the program. The second form of federal funding was "impact aid," which is provided to school systems whose populations have been substantially enlarged by the attendance of federal employees' children, but which have reduced tax revenues due to the presence of federally-owned property

[4]The district court found that the school board had a policy which permitted an individual to work out of field or out of certification for a period of time while he was attempting to obtain certification in that field.

[5]The Title I program has now been superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. Sections 3801-3876.

in the district. 20 U.S.C. Section 237. Although such funds constituted only a small portion of the school system's budget,[6] the defendants conceded that it was added to the school system's general education fund, from which teachers' salaries were paid.

After trial, the district court issued an oral opinion which found for the defendants on all counts. First, the court found that a contagious disease such as tuberculosis is not a "handicap" within the meaning of the Rehabilitation Act. As to her contention that she should have been given another position, the court concluded that Arline lacked the qualifications to teach outside of elementary education. In any case, the court held, the school board had no obligation to afford Arline alternative positions because it had an overriding duty to protect the public from contagious diseases.[7] Finally, the court concluded that neither the Title I funding nor the impact aid met the "federal financial assistance" requirement of section 504. With regard to the Title I money, the court stated that Arline was not a beneficiary of the funds because she was "not employed for purposes of Title I or in the Title I program..." As for the impact aid, the court concluded that it did not constitute "federal financial assistance" within the meaning of section 504.

II

Because of its jurisdictional implications, we first consider whether the defendant received any "federal financial assistance" within the meaning of section 504. We need not address the effect of the Title I funding, for

[6]Testimony by the school board's superintendent established that in 1978-79 the system received $39,000 in impact aid, or approximately 0.3 percent of the entire school budget.

[7]The court did not make clear whether it believed that the absence of such an obligation on the part of the school board resulted from its conclusion that tuberculosis is not a handicap; or whether, assuming that tuberculosis is a handicap, her susceptibility to it precluded Arline from being a person "otherwise qualified" for any teaching position; or finally, whether the school board's duty to afford "reasonable accommodation" did not extend to affording the relief she requested.

we find that the impact aid given to the defendants qualifies as "federal financial assistance" under section 504.

[1] As this court noted in *Jones v. Metropolitan Atlanta Rapid Transit Authority,* 681 F.2d 1376, 1379 (11th Cir.1982), *cert. denied,* — U.S. —, 104 S.Ct. 1591, 80 L.Ed.2d 123 (1984), "[o]n its face... [section 504] applies to programs receiving federal financial aid *of any kind*" (emphasis supplied).[8] *See also Consolidated Rail Corp. v. Darrone,* 465 U.S. 624, —, 104 S.Ct. 1248, 1253, 79 L.Ed.2d 568 (1984). Where the language of a statute is not ambiguous and does not lead to absurd results, the job of the courts is to apply it as written.

[2,3] The court below concluded and the defendants now contend, however, that the application of the statute is not so straightforward as its language would suggest. First, they find ambiguity in the term "federal financial assistance," and argue that the nature of federal impact aid is such that it could not have been within Congress' contemplation as a means of triggering the enforcement provision in section 504. Defendants' rationale is that impact aid is, as a matter of definition, not "assistance." They posit that it is more analogous to land taxes than to federal assistance since it is calculated on the basis of federal ownership of land and serves as a substitute for tax payments that the school system would receive had the land in its area been privately owned. We agree that when

[8]Congress' failure to limit the scope of section 504 with any qualifying language was not an oversight, as evidenced by the contrast between that provision and Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000d-1 to -6, an analogous civil rights statute which Congress clearly had in mind during the passage of the Rehabilitation Act and its amendments. *See* S.Rep. No. 1297, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.Code Cong. & Ad.News 6373, 6390. Title VI prohibits race discrimination in employment. Section 604 of Title VI, 42 U.S.C. Section 604 of Title VI, 42 U.S.C. Section 2000d-3, limits the enforcement of anti-race discrimination provisions of Section 601 to those situations in which "a primary objective of the Federal financial assistance is to provide employment." Section 504 includes neither the "primary objective" limitation nor any other. *See Consolidated Rail Corp. v. Darrone,* 465 U.S. 624, — , 104 S.Ct. 1248, 1253-54(1984). We would be acting beyond our authority to read into section 504 limitations which Congress chose not to establish when it clearly could have done so.

the federal government makes payments for obligations incurred as a market participant such payments do not constitute "federal assistance." *see, e.g., Hingson v. Pacific Southwest Airlines,* 743 F.2d 1408, 1414 (9th Cir.1984) (payments under contracts to carry mail); *Jacobson v. Delta Airlines,* 742 F.2d 1202, 1209 (9th Cir. 1984) (same), *cert. dismissed,* — U.S. —, 105 S.Ct. 2129, 85 L.Ed.2d 493 (1985). *See also Darrone,* 465 U.S. at —, 104 S.Ct. at 1256 n. 19. We must, however, reject the defendants' analogies to obligatory tax payments as fatally flawed. The indisputable fact is that the federal government's exemption from local taxes left it with no legal obligation to give impact aid. Its choice to assist local entities that happen to bear particularly heavy burdens because of this exemption renders its assistance no less a subsidy than any other form of aid that it dispenses. As such, it is federal financial assistance within the broad meaning that Congress intentionally gave the term in section 504.[9]

[4] We also find no merit in defendants' argument that the plaintiff failed to show that the impact aid funded a "program or activity" in which she was employed. Under their theory, it was not sufficient for plaintiff to show that the impact funds were non-earmarked monies which were deposited into the school board's general

[9]As the fifth circuit recently explained in its exhaustive analysis of the legislative history of both section 504 and the analogous civil rights statutes expressly incorporated by it, Congress' "single overriding purpose" was to ensure that the funds of the United States were not used to support discriminatory practices. *United States v. Baylor University Medical Center,* 736 F.2d 1039, 1042-43 (5th Cir. 1984), *cert. denied,* — U.S. —, 105 S.Ct. 958, 83 L.Ed.2d 964 (1985). To this end, Congress intentionally gave broad scope to the term "federal financial assistance" in section 504. As this court pointed out in *Jones* "the legislative history to the 1974 amendments is replete with notations indicating that Section 504 was intended to encompass programs receiving federal financial assistance of any kind..." 681 F.2d at 1379-80. Recognizing the overall goal involved, the Surpreme Court has rejected attempts to read limitations into the term which are not apparent on the face of section 504. *Darrone,* 465 U.S. at —, 104 S.Ct. at 1253-55. *See also Grove City College v. Bell,* 465 U. S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984) (interpreting "federal financial assistance" under Title IX). We too conclude that since impact aid does not fall within any specifically delineated exception to the statute, it must be defined as "federal financial assistance" in order to give effect to the broad legislative intent expressed in section 504.

revenue fund to be used as it saw fit and that her salary was paid out of that fund. They argue that she must also show that the impact monies were actually used to fund her salary, since "the School Board might have elected to use those funds to pay for a program which would have had to be eliminated if the impact funds had been cut off." This argument strains credulity. Such a theory would impose on the plaintiff the impossible burden of tracing money that is virtually untraceable under accounting procedures which commingle funds in a general account before outlays are made. It also misconceives the relevant "program" in this case. We hold that the relevant "program" with regard to these nonearmarked general revenue funds is the entire school system. Once the federal money was deposited into its general fund, all activities paid for out of that fund became subject to section 504.

III

We must next determine whether tuberculosis constitutes a "handicap" within the meaning of the Rehabilitation Act. The district court concluded that it did not, explaining that "it's difficult for this court to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person..." We look first to the language of the statute in deciding whether the court has given a proper construction to the term.[10] Second, we take guidance from the construction given by the agency entrusted with the statute's enforcement. Regulations promulgated by the Department of

[10]29 U.S.C. Section 706(7)(B) states that:

> Subject to the second sentence of this subparagraph, the term "handicapped individual" means...any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Health and Human Services, 45 C.F.R. Section 84.3, give further definition to all of the relevant terms of section 504."

[5] The language of these provisions in every respect supports a conclusion that persons with contagious diseases are within the coverage of section 504. As the record in this case makes clear, a person with tuberculosis is, when afflicted with the disease, one who "has a physical or mental impairment which substantially limits...major life activities," 29 U.S.C. Section 706(7)(B); 45 C.F.R. Section 84.3(j)(2)(i)(A), since the disease can significantly impair respiratory functions as well as other major body systems. Even when not directly affected by tuberculosis, Arline falls within the coverage of section 504 because she "has a record of such an impairment," 45 U.S.C. Section 84.3(j)(2)(iii), and "is regarded as having such an impairment," 45 U.S.C. Section 84.4(j)(2)(iv), by her employer. When a fact pattern falls so neatly within the statutory and regulatory framework, and when coverage would so clearly serve to promote Congress' intent to reduce instances of unthinking and unnecessary discrimination against those who are

[11]45 C.F.R. Section 84.3(j)(2) provides:

> (i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
>
> (ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> (iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
>
> (iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

the focus of the statute's concern, we would be hard pressed to find an exemption without further legislative direction.

As far as we can tell, there is no such legislative direction. Though the district court apparently thought it illogical to conclude that Congress would have placed contagious diseases within the definition of "handicaps" there is no objective evidence to support this conclusion. Neither the regulations nor the statutory language give any indication that chronic contagious diseases are to be excluded from the definition of "handicap." To the extent that the statute and regulations express any intent to limit the scope of section 504, Congress' failure to exclude contagious diseases from coverage when it specifically excluded alcoholism and drug abuse implies that it harbored no similar disapproval about them. We would as a general matter be reluctant to create an exemption where there is not a scintilla of evidence that Congress had any intention of doing so. We are especially reluctant in a situation where, as here, identifying an exemption would free recipients of federal funds from any duty even to consider whether reasonable accommodation could be made to those afflicted with contagious diseases. Such a result would, in our view, subvert Congress' intent to encourage recipients of federal funds to make decisions about the employability of those with physical or mental impairments only after a careful and informed weighing of the costs involved in accommodating the tasks at issue to their capabilities. This case, we believe, is precisely the kind in which that weighing process should have been made. We turn next to the the district court's conclusion that the school board did in fact give Arline proper consideration.

IV

[6,7] The law has recognized that not every handicapped individual can be integrated into every aspect of society in a cost-efficient manner. The regulations promulgated pursuant to section 504 therefore limit its applicability to

situations where the handicapped individual would be "otherwise qualified" if given "reasonable accomodation." *See Southeastern Community College v. Davis,* 442 U.S. 397, 410-13, 99 S.Ct. 2361, 2369-70, 60 L.Ed.2d 980 (1979); 45 C.F.R. Sections 84.3(k)(1), 84.12. While legitimate physical qualifications may be essential to the performance of certain jobs, *see* 442 U.S. at 406-07, 99 S.Ct. at 2367, both that determination and the determination of whether accommodation is possible are fact-specific issues. The court is obligated to scrutinize the evidence before determining whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice. *See, e.g., Strathie v. Department of Transportation,* 716 F.2d 227 (3d Cir.1983); *New York State Association for Retarded Children v. Carey,* 612 F.2d 644 (2d Cir.1979). In this case, the district court made no findings resolving the numerous factual disputes as to whether the risks entailed in retaining Arline in her elementary school position precluded her from having the necessary physical qualifications for the job, whether the same would be true if she were transferred to a position teaching less susceptible individuals, or whether the costs involved in accommodating her would place undue burdens on the school system.[12] Rather, it simply concluded that the school board was exempt from any duty whatever to weigh the actual costs and risks involved in accommodating Arline because of an overriding "duty to the public it serves." Section 504 by its existence establishes that such a duty cannot be used to shield an entity from liability for making decisions which "arbitrarily deprive genuinely qualified

[12] We recognize that the outcome in this case, as in Title VII cases, may depend on the allocation of burdens of persuasion or production. *See Doe v. New York University,* 666 F.2d 761, 776-77 (2d Cir.1981); *Prewitt v. United States Postal Service,* 662 F.2d 292, 307-10 (5th Cir. Unit A 1981). Because neither party has briefed this issue, however, we decline to address it.

handicapped persons of the opportunity to participate in a covered program." *Southeastern Community College*, 442 U.S. at 412, 99 S.Ct. at 2370. We therefore remand this case for futher findings[13] as to whether the risks of infection precluded Mrs. Arline from being "otherwise qualified" for her job and if so whether it was possible to make some reasonable accommodation for her in that teaching position, in another position teaching less susceptible individuals, or in some other kind of position in the school system.[14]

REVERSED and REMANDED.

[13]The court may at its option hold further evidentiary hearings if it deems them necessary. *See also* 29 C.F.R. Section 1613.704 (discussing factors for consideration in determining "reasonable accomodation"); *Prewitt*, 622 F.2d at 309 (same).

[14]Defendants' cross-appeal alleges error in the court's refusal to grant them attorneys' fees as prevailing parties under 29 U.S.C. Section 794a(b). We affirm this aspect of the court's holding.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3754

GENE H. ARLINE,

Plaintiff-Appellant,

versus

THE SCHOOL BOARD OF NASSAU COUNTY: and CRAIG MARSH, Individually and as Superintendent of Schools of Nassau, County, Fla.,

Defendants-Appellees.

- - - - - - - - - - - -

Appeal from the United States District Court for the Middle District of Florida

- - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 30, 1985, 11 Cir., 198__, _____F.2d_ _____).

(NOV 8 1985)

Before Vance and Anderson, Circuit Judges, and Henley*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellant Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

(s) Robert Vance

United States Circuit Judge

*Hon. J. Smith Henley, U. S. Circuit Judge for the Eight Circuit, sitting by designation.

THE COURT: All right. Gentlemen, I appreciate -- and ladies, I appreciate your coming back here. The Court is prepared to rule on this case at this time, and will recite the findings of fact in the record.

First of all, obviously the Court finds that the plaintiff, Gene H. Arline, was an employee of the Nassau County Board of Public Instruction on a continuing contract basis and that she had tenure. The complaint in this case is in two counts, and I'll deal with the second count first, that is, the count for denial of -- under color of state law, of civil rights, pursuant to section 1983. In that count the plaintiff contends that she was denied due process under 42 U.S. Code 1983. Having reviewed the file and heard the testimony here, the Court is of the opinion that there is no denial of either substantive or procedural due process. The plaintiff had at least one hearing and then a second hearing before the school board, then had a hearing before the Board of Education, State Board of Education, and the the matter was appealed pursuant to the administrative practices act of the State of Florida, chapter 120 of the Florida Statute, and the First District Court of Appeal ruled against her. In doing so, the Court of appeal discussed the contract issue that was involved there and an interpretation of the contract provision, which provided that -- if I could find it -- the contract was continuing unless the individual who had executed the contract was unable to perform duties because of illness.

Seems to this Court that that decision of the First District Court of Appeal is final and that I cannot disturb

that, and I see no denial of due process, either procedural or substantive, with regard to that decision or the action of the school board of Nassau County in that respect.

Now, dealing with the first count, that is, the count under 29 United States Code, Section 794. Appears to be no question that all of the courts which have dealt with this particular statute say that Congress intended and provided for a right of private action or private right of action for individuals who are otherwise qualified, handicapped persons, and who are not afforded the remedies and the procedures and the rights of a handicapped individual pursuant to that act. In this regard we have to look at the plaintiff and, first of all, decide whether she is in fact a handicapped person under the terms of that statute. And the Court hereby finds that she is not such a handicapped person. No question that she suffers a handicap and it is most unfortunate that she suffers or did suffer from this particular infectious tuberculosis, but it's difficult for this Court to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person as that act has been implemented and decided by the various courts. I'm aware that the courts have held that alcoholism, cancer, blindness, various other things have -- mental retardation, various other things, have been determined to be handicapped persons, but it's just the Court's opinion that an infectious disease such as the plaintiff in this case had, in my opinion, does not fall within that handicapped definition. But even assuming that it did fall within that definition, then we have to look to see whether or not she is otherwise qualified. And the Court finds that she was not qualified to teach in other than elementary education. And although the school

board has a local policy which does permit working out of field or out of certification for a period of time while an individual is attempting to obtain certification in the particular field in which she is working out of, there is no obligation on the part of the school to do so.

Thirdly, the school board has a duty to the public which it serves, and although the risk may be less if the plaintiff were employed in teaching adults or older students who move from classroom to classroom, I cannot believe that Congress intended that school boards should not look out for the very public which it serves and would intend that a school board would keep someone in the employ who, unfortunately, suffered from such an infectious or contagious disease.

Finally, assuming the Court is incorrect in all those respects, the Court has reviewed the cases of Brown versus Sibley, 650 Fed 2d 760, a Fifth Circuit Court of Appeals case in 1981, and also the Doyle case, of which I'll give you the citation in just a minute, Doyle versus University of Alabama in Birmingham, 680 Fed 2d 1323. While those cases are not directly on point, the Brown -- rather, the Doyle case was specifically referred to by the Court, the Eleventh Circuit Court of Appeals, in their August 6, 1982 opinion in Jones versus Metropolitan Atlanta Rapid Transit Authority, which is 681 Fed 2d 1376. As I said, a 1982 decision. In that case the court holds, and I'm quoting from the Court, at page 1382, "We therefore effectuate the plain meaning of the language in Sections 504 and 505 and conclude that a plaintiff need not establish that the employer received federal financial assistance for the primary purpose of providing employment in order to

have standing. Instead, a plaintiff need only show that the employer received federal financial assistance and that he or she was an intended beneficiary of the assistance," unquote.

The facts in this case demonstrate that the school board of Nassau County received, applied for and received Title I funds for remedial training for students in grades K through 12, although utilized in K through 6, and that the plaintiff was not one of the beneficiaries of those funds, although she was employed by the school board of Nassau County and although they also received federal impact aid, that plaintiff was for all intents and purposes, a third grade teacher and not employed for purposes of Title I or in the Title I program, and did nothing more with respect to the Title I program than any teacher would do with respect to any programs within the school system.

Furthermore, the Court finds that the federal impact funds are not the financial assistance that is referred to in 29 U.S. Code, section 794. Accordingly, the Court finds that the plaintiff has failed to prevail in this case and will direct the clerk of the Court to enter judgment for the defendants in accordance with these findings and conclusions by the Court.

THE CLERK: Yes, your Honor.

THE COURT: Gentlemen, I appreciate your courtesies and your demeanor; and the Court will now be in recess.

THE CLERK: All rise. Court is now in recess.

(Proceedings concluded).

Appendix D

LAW OFFICES OF
BRIAN T. HAYES, P.A.
245 E. WASHINGTON STREET
MONTICELLO, FLORIDA 32344
904-997-3526

October 28, 1985

Spencer D. Mercer, Clerk
United States Court of Appeals
Eleventh District
50 Spring Street, S.W.
Atlanta, Georgia, 30303-3147

RE: Nassau County School Board
vs. Arline

Dear Mr. Mercer:

Please advise the Court in consideration of the petition for Re-Hearing that the Appellee, should the hearing be granted, will rely on the recently released case of Atascadero State Hospital v. Scanlon, No. 84-351 (U.S. Sup. Ct., June 28, 1985). Since this case was recently decided by the Supreme Court and was undecided at the time of oral argument it was, naturally, not included in the brief of either party. I will furnish the text of the opinion to the court or to your office as soon as I have received it.

Very truly yours,

Brian T. Hayes

BTH:meg

cc: Steven H. Malone

Appendix E

THE WITNESS: Marianne McEuen, MC capital EUEN.

*** MARIANNE McEUEN, MD ***

was-called-as-a-witness on behalf of the Plaintiff, and after having been first duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. PADOVANO:

Q. Doctor McEuen, how are you employed?

A. I'm employed by the State of Florida.

Q. All right, And in what capacity?

A. I'm an assistant director of the Community Tuberculosis Control Service of the Department of Health and Rehabilitative Services.

Q. I assume by that that you are a physician?

A. Yes, sir.

Q. Licensed in the State of Florida?

A. That is correct.

Q. How long have you been a physician?

A. In 1956, I've been a physician; yes, sir.

Q. Have you practiced medicine regularly since that time?

A. Yes.

Q. And I take it from your position that your specialty is in the treatment of tuberculosis?

A. That is right.

Q. How long have you been involved in the treatment of the illness of tuberculosis, generally?

A. Since September 1959.

Q. Have you continously worked in that field since that time?

A. That is right.

MR. PADOVANO: The--I would tender Doctor McEuen as an expert. I don't see the need to go into her qualifications in detail unless counsel--

MR. HAYES: I stipulate.

MR. PADOVANO: All right.

BY MR. PADOVANO:

Q. Doctor McEuen, before I get into the testimony about the specifics, I'd like to ask you some general questions about tuberculosis. What--could you tell me, generally, what type of an illness it is and what body systems it affects, if any?

A. It's an illness caused by infectious organism. It can infect any part of the body but most often it affects the lungs.

Q. Okay. And is there a typical symptom?

A. There are symptoms which are considered classical symptoms of tuberculosis, but many people with tuberculosis have minimal or no symptoms, but there are specific symptoms.

Q. What do you generally think of as a symptom?

A. A typical symptoms of tuberculosis are cough, chest pain, weight loss, fever, night sweats and the degree of symptoms depends upon the degree of disease.

Q. You say it could have an effect upon the lungs. Does it have an effect upon the respiratory system in general in most cases?

A. Yes, in most cases.

Q. And is it the kind of illness which has the potential to limit a major life function such as breathing or walking or something such as that?

A. It could, yes.

Q. Now, during the course of your practice, have you had occasion to either treat or evaluate the plaintiff, Gene Arline?

A. Evaluate, yes.

Q. And could you tell us basically the time that you evaluated her and exactly what you were reviewing.

A. I've been--basically evaluated her since 1959, since I started my--

Q. Let me ask you this: Have you seen her personally off and on during that period of time or--

A. Not as a patient.

Q. I see. But in the sense of evaluating the status of her illness; is that it? I'm not sure of the capacity that you have had in your contact with her and that's why I'm asking you. You were her treating physician?

A. By reviewing records and examining x-rays.

Q. When would you have occasion to do that?

A. When?

Q. Yes, ma'am.

A. Periodically during her treatment and following treatment.

Q. Would that routinely be done, in the course of regular medical checkup, that a patient such as this would--

A. Yes.

Q. --normally do? All right. Now, did you ever see her?

A. Yes.

Q. And how many times did you see her?

A. I saw her in the hearing before the school board and I also saw her in consultation at the Health Department on one occasion.

Q. All right. And are the records kept at the Health Department there; are her records kept at the Health Department?

A. The records are kept at the Health Department in Duval County, but we have records in our office also in Jacksonville.

Q. I see. Is this customarily the case in the unit that you work in? In other words, would you have records of tuberculosis patients which might be duplicated also?

A. Yes.

Q. And how far back does Mrs. Arline's medical record go that you have?

A. May I refer to my records?

Q. Yes, absolutely.

A. Thank you, March 1957.

Q. And then when did you first evaluate her?

A. Me as an individual?

Q. Can you tell that from the records?

A. May 196l.

Q. All right. And how long of a period of time did you monitor the records?

A. The last record we have is June--is May 29th, 1981.

Q. So from '61 to '80 you were regularly--I say regularly --not necessarily frequently, but you were reviewing those records--

A. Yes.

Q. --from time to time? Can you determine from the records whether Mrs. Arline ever had the illness in an acute form in such a degree that it affected her respiratory system?

A. Yes.

Q. That is the case?

A. Yes, she did.

Q. Was she ever hospitalized with the illness?

A. Yes.

Q. And that appears in the records that you are referring to?

A. Yes.

Q. Now, let me ask you: During the course of your evaluation, did it appear to you at any time that there were ever any positive tuberculosis tests?

A. Yes.

Q. And could you summarize for me when those occasions were.

A. Positive?

Q. Yes, from your record.

A. Originally in 1957 and then again in 1977 and in March of 1978 and in November of 1978.

Q. All right. Have you had occasions to--you were, I suppose, familiar with her employment at the time that you were evaluating these records?

A. I was in 1977. I'm not absolutely certain that I was aware of her employment prior to that.

Q. All right. At any time did you have occasion to make any recommendations concerning her continued employment with respect to her--the illness that you have evaluated?

A. Yes.

Q. And when was that and, if you will, please, briefly summarize what it was that you had recommended.

A. It was in February, I believe, when the last culture was reported positive, which I think was February of 1979,

and it was my recommendation at that time that she not continue to teach third grade students.

Q. Now, I don't wish to go into the medical basis for that in detail--if Mr. Hayes wants to, he may--but could you tell us just briefly why you recommended that?

A. Because small children are considered highly susceptible to tuberculosis and because the pattern of relapse suggested that there might be a possibility of further relapses.

* * * * * * * * * * * * * *

So I understand and so the Court understands, tuberculosis is infectious?

A. That's correct.

Q. How would you categorize it--how would you categorize its infectiousness on a scale of one to ten? Is it highly infectious or minimally infectious?

A. I would say it's probably medium infectiousness, if you are comparing it with something like chicken pox, for example, which is very highly infectious. In other words, everybody exposed to tuberculosis doesn't get infected, everybody.

Q. And the infectivity is largely effected through breathing; isn't that correct?

A. That is correct. Exhaling or respiration, coughing, sneezing, breathing.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
FEB 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-1277

IN THE SUPREME COURT OF THE UNITED STATES

THE SCHOOL BOARD OF NASSAU COUNTY, FLORIDA; and CRAIG MARSH, Individually and as Superintendent of Schools of Nassau County, Florida,

Petitioners,

---vs.---

GENE H. ARLINE,

Respondent.

BRIEF OF OPPOSITION

GEORGE K. RAHDERT, ESQUIRE
Rahdert, Anderson & Richardson
233 Third Street North
St. Petersburg, FL 33701
(8213) 823-4191

Attorneys for Respondent.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Tuberculosis is a handicap within the meaning of Title 29 U.S.C. 701 (Section 504, Rehabilitation Act of 1973).

2. Whether the receipt of Miniscule Federal Financial Aid by a public employer pursuant to 20 U.S.C. Section 237 is sufficient to invoke jurisdiction under Title 29 U.S.C. 701 et. seq. (Section 504 of the Rehabilitation Act of 1973).

3. Whether the School Board is immune under the Eleventh Amendment to the United States Constitution.

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CITATION TO OPINION BELOW

JURISDICTIONAL GROUNDS

STATUTES INVOLVED

(Respondent accepts Petitioner's presentation of the above sections.)

STATEMENT OF THE CASE

Respondent accepts Petitioners Statement of the Case, except with regard to the testimony of Marianne McEuen, M.D. Dr. McEuen did suggest, as Petitioner indicates, that Tuberculosis could be transmitted to others by breathing, coughing, sneezing, or other respiratory activity. It was her opinion, however, that Respondent could work with older children and adults, and that the risk of infection of those groups was negligible. At the time of Respondent's dismissal, Petitioner had available the recommendation of Dr. McEuen, which stated that Ms. Arline should not continue to teach third grade students because young children are "highly susceptible" to tuberculosis, and because of the possibility of Respondent suffering a relapse. Respondent has suffered three relapses of tuberculosis since her childhood.

REASONS FOR DENYING THE WRIT

ISSUE 1: WHETHER TUBERCULOSIS IS A HANDICAP WITHIN THE MEANING OF TITLE 29 U.S.C. 701 (Section 504, Rehabilitation Act of 1973).

(i) The issue is premature for decision by this Court

There is presently no judicial decision from the federal courts of appeals other than the decision below which directly addresses whether the term "handicapped individual" includes those afflicted by a contagious disease. The lack of the decisional law on this subject suggests several important reasons for the Court to delay its involvement. "One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on (federal law questions) among the federal court of appeals." Stern & Gressman, Supreme Court Practice, p. 265 (5th ed. 1971). Moreover, the Court benefits from hearing a wide variety of views of an issue. Respondent submits that, in order to allow time for the arguments on all sides to develop, the Court should exercise its discretion and deny the Writ.

There is no conflict among the lower federal courts on what constitutes a "handicapped individual" within section 504 of the Act. All courts have given effect to the plain meaning of the statutory test of 29 U.S.C. §706(7)(B), which allows any person who has "a physical or mental impairment which substantially limits one or more... major life activities" to seek redress under section 504. Petitioner concedes that the courts have construed the term "impairment" to encompass a wide variety of physical and mental afflictions (Pet. Br. at 10), and does not dispute the Respondent's affliction substantially limits her ability to work. Yet Petitioner's brief fails to provide case or statutory authority upon which the court below could justify a departure from clear statutory language and established legal principles. The absence of any such authority in Petitioner's brief for excluding certain "unpopular" afflictions from the coverage of the Rehabilitation Act is itself evidence that the

issue presented is premature for consideration by this Court. Respondent respectfully submits that the Court await further developments in the lower courts to determine whether Petitioner has presented an issue of national importance. See Stern & Gressman at 284.

(ii) The issue is of minor importance in the overall structure of the law.

As noted above, the question of what constitutes a "handicapped individual" is not a contentious one. In many cases, the parties simply stipulate to the issue. See, e.g. Strathie v. Dep't of Transporation, 716 F.2d 227, 231 (3d Cir. 1983) (hearing impaired bus driver); Bentivegna v. United States Dep't of Labor, 694 F.2d 688 (9th Cir. 1982) (diabetic construction worker.

Petitioner suggests that the issue of whether an individual who suffers from a contagious disease is "handicapped" is an important one because of the employer's interest in protecting the health and safety of employees and clients. (Pet. Br. at 15, 18) Although many of the cases arising under section 504 involve consideration of the employer's interests along with those of qualfied handicapped individuals, none suggest that this weighing of interests should take place when determining if the plaintiff is handicapped. In many Section 504 cases, once a plaintiff shows that an employer denied him employment because of his physical condition, the burden of persuasion then shifts to the employer to show that its requirements are sufficiently "job-related" to justify the denial. See Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983). See also 29 C.F.R. 1613.702 et seq. In other cases, after the plaintiff makes his prima facie case, the employer must then show that, despite its duty to make "reasonable accommodations" for "otherwise qualified" handicapped persons, such accommodations were impossible or would impose an undue hardship. See Southeastern Community College v. Davis, 442 U.S. 397, 60 L.Ed. 2d 980, 99 S.Ct. 2361 (1979); Strathie, supra. Clearly, the framers of the

Act did not intend that persons who are dismissed from employment because of disease should be denied such opportunities to challenge their employer's justifications in court. In enacting Section 504, Congress stressed the importance of the evenhanded treatment of handicapped individuals. Southeastern, 99 S.Ct. at 2369.

Petitioner contends that the 1978 Amendments to the Act concerning alcoholism and drugs indicate Congress' intent to exclude from Section 504 individuals who present "unavoidable health risks" because they are not "handicapped individuals." (Pet. Br. at 17.) Yet Congress has never indicated that such risks are to be considered when determining who is "handicapped." Courts typically analyze the risks faced by the handicapped individual and by others in their environment when determining whether program requirements are discriminatory, or when considering whether "reasonable accommodations" can be made. See New York State Assoc. for Retarded Children, Inc. v. Carey, 612 F.2d 644 (2d Cir. 1979) (plan to separate carriers of hepatitis B from other school children is discriminatory under 504 where health hazard not shown to be more than remote possibility); Strathie, supra (remand to determine whether accommodations to hearing-impaired bus driver could eliminate all appreciable risks to passengers' safety); Duran v. City of Tampa, 451 F.Supp. 955 (M.D. Fla. 1978) (refusal to hire because of epilepsy discriminatory under Section 504; Gladys J. v. Peraland Ind. School District, 520 F.Supp. 869 (S.D. Tex. 1981) (refusal to place schizophrenic in residential school nondiscriminatory under Section 504 because of "striking out aggressively" and other maldaptive behaviors). The holdings of the above cases were reached after careful consideration of suggested measures to protect the health and safety of handicapped individuals and all those with whom they come into contact. To suggest, as Petitioner does, that Congress in 1978 sought to remove such protections from individuals who present potential risks to others due to their handicap, is to ignore not only the purposes of the Rehabilitation Act, but established case law as well.

(iii) Whether or not the decision below is correct, Petitioner's argument is witout merit.

In its brief, Petitioner distorts the holding of the Eleventh Circuit Court of Appeals with respect to "reasonable accommodations." According to Petitioner, the court below held that even if Respondent were not "otherwise qualified" for her teaching position, her employer might nevertheless be required to accommodate her. (Pet. Br. at 15.) From this premise, Petitioner concludes that the Court of Appeals' concept of reasonble accommodation would require employers to unreasonably compromise the safety of others. (Pet. Br. at 18).

Petitioner has misinterpreted the holding of the Eleventh Circuit and attributed to it a significance well beyond its intended limits. The court below did not hold that the School Board must compromise the health of employees or students in order to accommodate Respondent. It simply remanded for fact-finding to determine whether she was "otherwise qualified" and, if so, whether reasonable accommodations could be made. Arline v. School Board of Nassau County, 772 F.2d 759, 765 (11th Cir. 1985). Although the court did suggest in dicta that reasonable accommodations might include placement "in another position teaching less susceptible individuals," the court did not suggest that, under those circumstances, Respondent need not be "otherwise qualified." By raising the possibility of assigning Respondent to another position, the Eleventh Circuit merely encouraged a flexible approach to accommodating a qualified, handicapped individual. This dicta is consistent with that of the Supreme Court; see Southeastern, 99 S.Ct. at 2370 ("situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory").

Petitioner also contends that "whether an individual is to be considered 'qualified' under the Act depends on whether such individual can, with or without reasonable accommodation," perform the essential functions without endangering health or safety (citing Prewitt, supra) (Pet. Br. at 12-13; emphasis added). Prewitt, however, merely affirms the established proposition that an employer need not hire a handicapped

individual who cannot perform without accommodation. 662 F.2d at 307. Nowhere does the Prewitt court (or any court) state that a handicapped individual must be qualified in all respects even without reasonable accommodations.

Petitioner's arguments as to whether Respondent is "otherwise qualified" and as to whether "reasonable accommodations" can be made raise issues of fact not reached by the Court of Appeals. These arguments should be addressed to the district court on remand.

(iv) The court below reached the correct result after full consideration of the issues.

The Court of Appeals decided that Respondent was a "handicapped individual" after finding that "neither the regulations nor the statutory language give any indication that chronic contagious diseases are to be excluded from the definition of 'handicap'" and that "there is not a scintilla of evidence that Congress had any intention of (creating an exemption)." 772 F.2d at 764. The court also recognized that creating an exemption for those afflicted with contgious disease would defeat Congress' intent to "encourage recipients of federal funds to make decisions about the employability of those with physical or mental impairments only after a careful weighing of the costs involved in accommodating the tasks at issue to their capabilities." Id.

This refusal to carve a judicial exemption into the nondiscrimination provision of the Rehabilitation Act of 1973 is certainly consistent with the pronouncements of the legislature. In enacting and amending Section 504, Congress "made a commitment to the handicapped, that, to the maximum extent possible they shall be fully integrated into the mainstream of life in America." S.Rep. No. 890, 95th Cong., 2d Sess. 39 (1978) (emphasis added).

Petitioner argues that the Act requires an employer to "accommodate the requirements of a job to a handicapped

individual's abilities" and implies that unless an employee's abilities are the basis of the employer's action, the employer has no obligations under Section 504. (Pet. Br. at 13-14.) This reading of the Act is contrary to legislative history, which consistently demonstrates congressional intent to prevent such narrowing constructions of Section 504. See S.Rep. No. 1297, 93rd Cong., 2d Sess., reprinted in 4 U.S. Code Cong. & Ad. News 6414 (1974) (definition of "handicapped individual" expanded to reach those persons outside the employment arena and to reach those not involved with vocational rehabilitational programs.)

There is an unbroken line of case authority which supports the Eleventh Circuit's reading of congressional intent. In Consolidated Rail Corp. v. Dorrane, 104 S.Ct. 1248, 1255 (1984), the Supreme Court noted the remidial nature of the Rehabilitation Act and held that its provisions are to be accorded and broad construction to effectuate the Act's purposes. The court in Strathie, supra, noted that broad judicial deference to administrators would undermine Congress' intent to sterotypes or generalizations not deny handicapped individuals equal access to federally-funded programs. See also Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 982) (Act mandates "significant accommodations for the capabilities and conditions of the handicapped") (emphasis added).

The result reached by the Eleventh Circuit was both fair and farsighted. If the court had followed Petitioner's recommendation and interpreted Section 504 to exclude persons with contagious diseases, its precedent would potentially have led to massive litigation over what constitutes "contagious." Meanwhile, the focus of program administrators and courts would have been directed away from the key issue: whether the qualified handicapped individual can be reasonably accommodated to work or learning environment.

ISSUE 2: WHETHER THE RECEIPT OF FEDERAL FINANCIAL AID BY A PUBLIC EMPLOYER PURSUANT TO 20 U.S.C. SECTION 237 IS SUFFICIENT TO INVOKE JURISDICTION UNDER TITLE 29 U.S.C. 701 et seq. (Section 504 of the Rehabilitation Act of 1973).

(i) The issue is premature for decision by this Court.

As with respect to the definition of "handicapped individual" under section 504, Petitioner proposes an interpretation of "federal financial assistance" under section 504 which as of yet has no support in any federal court of appeals. By suggesting that federal aid might reach such a miniscule level such as to no longer constitute "federal financial assistance" under section 504, Petitioner presents to the Court a novel and perhaps interesting issue. However, Respondent submits that the Court should reserve its jurisdiction for those issues which the lower courts have had an opportunity to address and which have since given rise to important legal problems. See Stern & Gressman, Supreme Court Practice, at 284.

Petitioner contends that, by holding a recipient of impact aid to be covered by section 504, the Court of Appeals initiated a "dramatic expansion" of the concept of federal financial assistance away from previous decisions. (Pet. Br. at 19.) Yet the significance which Petitioner attaches to the holding below is contrived. No court has recognized a theory by which a certain amount of federal funding would be insufficient to give rise to section 504 coverage. The Court of Appeals' holding would only have been "dramatic" if the court had departed from established legal principles and recognized such a theory.

Because the court recently clarified the meaning of "federal financial assistance" under section 504 of the Rehabilitation Act in Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), ruling on this question of law today would be duplicative and wasteful of the Court's limited resources. In Darrone, 465 U.S. 624 (1984), the Court held that an action under section 504 must

be brought against the specific "program or activity" receiving federal funds, but that there is no implicit requirement under section 504 that the funds be "primarily intended" to promote employment. This holding indicates that attempts to read limitations into the meaning of the term "federal financial assistance" which are not apparent on its face will be rejected. See Arline, 772 F.2d at 76 n.9. Since the language of section 504 provides no foundation for an implicit requirement of "something more than miniscule" aid, Respondent submits that the Court should refrain from exercising its discretionary jurisdiction in this case.

(ii) Whether or not the decision below is correct, Petitioner's argument is without merit

Petitioner relies on the Supreme Court's holding in Grove City College v. Bell, 465 U.S. 555 (1984), for the proposition that funds earmarked for one program which find their way into a budget governing a "separate and distinct" program do not give rise to section 504 coverage of the latter program. (Pet. Br. at 19-20.) Regardless of whether Petitioner's interpretation is correct, Grove City is inapplicable to the present factual circumstances. The Court in Grove City carefully distinguished nonearmarked direct grants (such as the impact aid in the present case) from the grants of financial aid to students which were under its consideration. Grove City, 104 S.Ct. at 1221.

Despite Petitioner's repeated insistence that the "program-specific" requirement of Grove City and Darrone precludes section 504 coverage in this case, Petitioner fails to delinqate the specific program in which the impact aid was directed. Petitioner suggests that impact aid is "compensatory" in purpose and therefore not federal financial assistance at all; however, this contention provides scarce support for its argument that Respondent was unconnected with the specific program receiving federal assistance.

(iii) The court below reached the correct result after full consideration of the issues.

The Eleventh Circuit correctly concluded that the present case does not fall within the line of cases involving obligatory payments made by the federal government as market participant. The case of Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984), cited by Petitioner, succinctly states the rule that when the federal government compensates an entity for goods or services provided, such expenditures constitute "federal financial assistance" only when a subsidy is involved. This distinction between obligatory payments and subsidies has also been recognized by the Supreme Court. In Darrone, supra, the Court noted that, in light of government payments in excess of fair market value, federal financial assistance had been awarded. 104 S.Ct. at 1255 n.19. In the present case, the federal government was clearly under no obligation to deliver impact aid to Petitioner; by providing such a subsidy, it clearly placed Petitioner wtihin Section 504 coverage.

The Eleventh Circuit's holding that the relevant "program" with regard to nonearmarked general revenue funds was the entire school district, was consistent with statutory and case law. The legislative history of section 504 indicates that Congress intended to provide the most assistance and protection for the handicapped that the expenditure of federal dollars could provide. See Cong. Rec. 5880-83 (1973) (statement of Senator Cranston). Although there is limited case law on the subject of nonearmarked funding and section 504's "program-specific" requirement, at least one court has held that where the plaintiff's salary is paid from the same source into which nonearmarked federal funds are deposited, plaintiff's program is presumed to have received "federal financial assistance" within the meaning of section 504. Bradford v. Iron County C-4 School District, 36 FEP Cases 1296, 1299 (E.D. Mo. 1984) (plaintiff held to have participated in program covered by section 504 where defendant unable to show that program at issue did not utilize federal funds). To require Respondent to trace federal funds through Petitioner's general account would impose an "impossible

burden of tracing money that is virtually untraceable" upon the aggrieved party. 772 F.2d at 763. Such a result would hardly comport with the intent of Congress to maximize protections for the handicapped.

ISSUE 3: WHETHER THE SCHOOL BOARD IS IMMUNE UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

(i) Petitioner's argument is wholly without merit.

In support of its contention that a district school board in Florida is a direct branch of the State of Florida, Petitioner cites Adkins v. Duval County School Board, 511 F.2d 690 (5th Cir. 1975). In Adkins, the court described the localized funding scheme for school boards in Florida and, unable to distinguish a Florida school board was not a "person" within the meaning of section 1983. In Campbell v. Gadsden County District School Board, 511 F.2d 690 (5th Cir. 1976), also cited by Petitioner, the court stated that "our analysis (in Adkins) of the nature of Florida school boards in the context of determining their similarity to municipalities is sufficient to convince us that they are not the type of entities which are sheltered by the Eleventh Amendment." Petitioner cites no cases which indicate that Florida school boards are to be treated as the state for purposes of the Eleventh Amendment, nor does it provide any support for its contention that this issue is a "question of fact" which must be resolved on a case-by-case basis. (Pet. Br. at 24.) It is well-established that locally-funded governmental entities, such as Petitioner, are not entitled to Eleventh Amendment immunity. Edelman v. Jordan, 415 U.S. 651 (1974). Since Petitioner provides no basis in law or fact for departing from this principle in the present case, Respondent submits that the Court should deny the writ of certiorari.

CONCLUSION

There is currently no legal authority, express or implied, for the narrowed construction of section 504 which Petitioner

proposes. The Court should decline to exercise its discretionary jurisdiction so that the issues presented by Petitioner may be further tested and developed in the lower courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition was furnished by U.S. Mail to Brian T. Hayes, 245 E. Washington Street, Monticello, Florida 32344; and to JOHN D. CARLSON, 1030 East Lafayette Street, Tallahassee, Florida 32301, this 26 day of February, 1986.

GEORGE R. RAHDERT, ESQUIRE

Supreme Court, U.S.
FILED
MAR 29 1986

Case No. 85-1277

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE SCHOOL BOARD OF NASSAU COUNTY, FLORIDA; and CRAIG MARSH,
Individually and as Superintendent of Schools of Nassau County, Florida,

Petitioners,

---vs.---

GENE H. ARLINE,
Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS REPLY BRIEF

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ATTORNEYS FOR PETITIONERS

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Appendix B: *Legal Status Of An AIDS Infected Person;* Excerpt From: (9th Annual Local Government Law In Florida Seminar), (March, 1986), p. 8.10.

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REPLY ARGUMENT

Pursuant to Rule 22.5, Supreme Court Rules, Petitioners reply to the Brief of Opposition filed by Respondent.

A. In her Brief, Respondent asserts that the issue in this case is premature and not ripe for consideration by this Court. Petitioners suggest that the matter is not only ripe but a series of cases and legislative enactments have already gone forward based on the decision of the 11th Circuit.

To wait for diverse opinions from various Circuit Courts or legislative bodies would only exacerbate confusion in an area of significant national concern. Specifically, since this decision has been rendered, it has been widely interpreted as precedent for AIDS cases. Recently, in an article appearing in the March, 1986 issue of the "Employment Relations Bulletin" (See Appendix A for full text), it was reported that the Executive Director of the Florida Commission on Human Relations has ruled that AIDS is a handicap within the meaning of the Florida Law. This journal reported (page 4) as follows:

> "In reaching his decision, Human Relations Commission Executive Director Donald Griffin found that:
>
> > 'Based upon the plain meaning of the term "handicap" and the medical evidence presented, an individual with acquired immune deficiency syndrome is within the coverage of the Human Rights Act of 1977 in that such an individual

> "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties.'

In support of this finding, Griffin cited *Arline v. School Board of Nassau County,* 772 F.2d 759 (11th Cir. 1985), which the *"CERL Bulletin"* previously noted could be the basis for a finding that AIDS is a handicap. That case involved the finding that tuberculosis, a communicable disease, was a handicap under the definition of the federal Rehabilitation Act of 1973 (See *Disease is Handicap Under Rehabilitation Act; May Impact on AIDS,* 21 *"CERL Bulletin"* 3 (December, 1985)). Griffin also found that Broward County had failed to establish that a requirement that a person not have AIDS is a bonafide occupational qualification (BFOQ) which would justify discrimination under the statute."

Additionally, the Florida Legislature is now considering legislation to define AIDS as a handicap, once again citing the *Arline,* supra, case as was reported in the lecture outlines of the *9th Annual Local Government Law in Florida Seminar.* (See appendix B) In that proposed legislation the case herein sought to be reviewed is cited as direct authority.

Certainly, Petitioners suggest, this case, although a Tuberculosis case, has become precedent as suggested in their Brief. (See page 18 of Petitioner's Brief) Therefore, they suggest that the time is now for the Court to accept this significant case and determine directly and clearly that infectious diseases are not "handicaps" within the meaning of Section 504, Rehabilitation Act of 1973.

B. Since this matter was originally briefed the issue of accomodation of a handicapped worker has been considered and reported in a District Court case in Maryland. In *Carty v. Carlin,* N-84-4565 D. Maryland (12/85), the Honorable Edward S. Northrup determined in construing Section 504 of the Rehabilitation Act of 1973, that an employer's duty to accomodate is limited to the employee's current job and does not include the right to a transfer to another job if accomodation in the current job is not feasible, even if the employee can perform the other job. This case is significant, Petitioners suggest, because the issue before this Court also is concerned with the Respondent's claims of entitlement to be transferred to a job where she would come in contact with "less susceptible individuals".

Petitioners now argue that the *Carty,* supra, case and its rationale, has direct bearing on the issues in this case and should be adopted by this Court. Although the *Carty,* supra, case appears to be one of first impression, it clearly demonstrates the confusion and uncertainty currently being experienced by Federal Courts throughout the country.

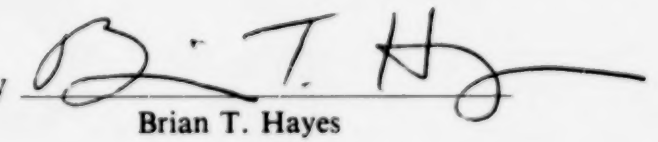
CONCLUSION

Because of the immediate significance of the issue in this case, Petitioners suggest that certiorari is proper and appropriate to resolve the issue herein raised.

Respectfully Submitted

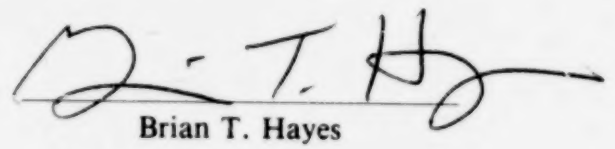
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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioners Reply Brief For Writ Of Certiorari was furnished by U. S. mail to George K. Rahdert, Esquire, 233 Third Street North, St. Petersburg, Florida 33701, Attorney for the Respondent this 28th day of March, 1986.



Brian T. Hayes

Appendix A

AIDS RULED HANDICAP IN FLORDA; NATIONAL EDUCATION URGED

In an important decision with possible national repercussions, the Executive Director of the Florida Commission on Human Relations has ruled that the disease AIDS is a handicap within the meaning of Florida law and that persons with the disease are thus protected from discrimination because they have it. The investigatory determination in the case of Todd Shuttleworth, a policy analyst for the Broward County Office of Budget and Management Policy until he was fired in September 1984 after his employer discovered that he had AIDS, was hailed by gay rights activists across the nation as an important victory.

Shuttleworth's employer never denied that he was discharged because he had AIDS. Instead, the county said that it was acting on the basis of a document prepared by the Florida Department of Health and Rehabilitative Services (HRS). The HRS document recommended that health care professionals who treated AIDS patients should avoid contact with those persons under certain circumstances, such as if the employee takes steroids daily, if they are pregnant, if they have certain known immune deficiency diseases, or if they have recently received chemotherapy.

In reaching his decision, Human Relations Commission Executive Director Donald Griffin found that:

> Based upon the plain meaning of the term "handicap" and the medical evidence presented, an individual with acquired

> immune deficiency syndrome is within the coverage of the Human Rights Act of 1977 in that such an individual "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties."

In support of this finding, Griffin cited *Arline v. School Board of Nassau County,* 772 F.2d 759 (11th Cir. 1985), which the *CERL Bulletin* previously noted could be the basis for a finding that AIDS is a handicap. That case involved the finding that tuberculosis, a communicable disease, was a handicap under the definition of the federal Rehabilition Act of 1973 (*See Disease is Handicap Under Rehabilition Act: May Impact on AIDS,* 21 *CERL Bulletin* 3 (December, 1985)). Griffin also found that Broward County had failed to establish that a requirement that a person not have AIDS is a bonafide occupational qualification (BFOQ) which would justify discrimination under the statute.

Griffin stated in conclusion that he was:

> mindful of the serious and important concerns of the employer, the other employees and the public. Based upon my review of this case, I do not find that Respondent was acting in bad faith when it made the decision to terminate Complainant; nevertheless, there is an absence of evidence to show with any reasonable probability that AIDS can be transmitted by casual contact that commonly occurs in the workplace.

Griffin futher noted that; "In so holding, I specifically refrain from resolving issues involving employment

Appendix A

decisions to reassign or alter the working conditions of employees with AIDS or decisions involving employees with transmissible infections." Also left unresolved are important issues concerning whether the Act covers persons in high risk groups or those who have tested positive for exposure to the virus but have not developed AIDS.

It is important to note that Broward County may still appeal the Executive Director's investigatory decision to the full Commission and can also appeal it in circuit court.

Shuttleworth's attorney, Larry Corman, said that the decision "sets a statewide precedent. It puts every employer in the State of Florida on notice that to discriminate solely because that individual has contracted AIDS constitutes an unlawful employment procedure which violates Florida statutes and subjects employers to liability for damages and attorney's fees." Corman has ask for $5 million dollars in compensatory damages for Shuttleworth.

Shuttleworth himself, reached in San Francisco where he now lives, was quoted in the *Miami Herald* as saying that the decision "is great news." He said that he was "never really that bitter, but I think the county was stupid. The more I see the evidence and statistics on AIDS, the more I conclude that people who think it's casually transmitted are just real dumb."

Ron Najman, spokesman for the National Gay Task Force in New York, was quoted by the *Herald* as saying

that "[w]e're very pleased with the decision" and that the "desire to fire people or throw them out of their apartments or fumigate their belongings — all this nonsense is based on the belief that AIDS is easy to catch. That's false."

Concern about the disease has been much in evidence across the nation in recent weeks. In Congressional testimony before the House Government Operations Subcommittee on Intergovernmental Relations and Human Resources, witnesses related tales of discrimination in Washington state, particularly Tacoma. Linda Taylor, director of the Seattle Office for Women's Rights, said that because of Seattle's strong antidiscrimination laws in employment, housing, and provision of city services to various protected groups, including gays, that many persons with AIDS or AIDS Related Complex (ARC) were moving to that city. Taylor's remarks were reported in the *Government Employee Relations Report* (23 *GERR* 1779 (1985)).

In San Francisco, the San Francisco AIDS Foundation has announced that more than half of the cost of an AIDS education package aimed at relieving the fears of employers and employees has been underwritten by area corporations, including Levi-Strauss & Co., Inc. and BankAmerica. The package will consist of written materials in English and Spanish, a videotape, and an educational program manual.

Back in Florida, another bill regarding the treatment of teachers and students with AIDS has been filed in the Florida Legislature. House Bill 137, introduced by Rep. Javier Souto (R-Miami), would allow the Florida

Appendix A

Department of Education to test district, private elementary, or secondary school teachers and students if it was found that there was "probable cause" that they had AIDS. The bill would also require infected students to be taken out of the general school population, but would allow them to remain in school and be taught by teachers with AIDS. Local school boards would also be empowered to terminate, with pay, teachers found to be infected with the disease. An earlier bill concerning AIDS in Florida Schools was filed by Sen. Don Childers (D-West Palm Beach) (*See CDC, NEA Issue AIDS Guidelines,* 22 *CERL Bulletin* at 2 (January, 1986)).

Further developments in the AIDS crisis, particularly with regard to Florida and how the workplace is affected, will be covered in future issues of the *CERL Bulletin.*

A-1 Excerpt from: *EMPLOYMENT RELATIONS BULLETIN,* Center for Employment Relations & Law, College of Law, Florida State University, Tallahassee, FL 32306, (March 1986, No. 24), p.4.

Appendix B

C. Legal status of an AIDS infected person

1. If AIDS is defined as a handicap, there can be no discrimination.
    a. If AIDS is a handicap, there can be protection by both federal and state antidiscrimination laws.
    b. In *Arline v. Nassau County School Board,* F.2d 1759 (11 Cir. 1986), a teacher with T.B. was declared to be handicapped under the Federal Rehabilitation Act.
    c. Based upon that decision, the Florida Commission on Human Relations has indicated that a city budget director with AIDS was handicapped. This case has not been reputed nor has it been reviewed judicially.
    d. If a handicap designation is upheld, employees would be protected by S.760,F.S. as well as the Florida constitution.
    e. Likewise students would be protected under the Federal Education For The Handicapped Act as well as the Florida constitution.

D. Pending Legislation

1. Senate Bill-44 (Fla.) This bill would:
    a. Require HRS to inform school boards of any student or employee with AIDS
    b. Authorizing school boards to test for AIDS
    c. Requiring segregation of students
    d. Requiring no employment of AIDS infected person in a cafeteria or food service.
2. Should AIDS be declared a handicap, Senate Bill-44 would probably be unenforcible as against federal and state law.

[A-B]Excerpt From: *9th ANNUAL LOCAL GOVERNMENT LAW IN FLORIDA SEMINAR,* The Florida Bar Continuing Legal Education Committee And The Local Government Law Section; (March, 1986), p.8.10.

Supreme Court, U.S.
FILED
JUL 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1277

In the Supreme Court of the United States

October Term, 1985

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA and CRAIG MARSH, Individually and as Superintendent of Schools of Nassau County, Florida

Petitioners

vs.

GENE H. ARLINE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED January 27, 1986
CERTIORARI GRANTED April 21, 1986

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The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear in the following sections in the appendix to the printed Petition for Certiorari:

Findings of Fact and Final Judgement, United States District Court, Middle District of Florida, Jacksonville Division, dated November 17, 1983
Appendix C

Opinion of the United States Court of Appeals, Eleventh Circuit, dated September 30, 1985
Appendix A

Order of the United States Court of Appeals, Eleventh Circuit, denying Petition for Rehearing and Suggestion for Rehearing En Banc, dated November 8, 1985
Appendix B

Extracts from Docket Sheet

United States District Court
Middle District of Florida
Jacksonville, Division
Case #82-305-Civ-J-JHM

March 23, 1982:	Complaint filed.
May 28, 1983:	Order: defts' motion to dismiss count one is GRANTED, with leave to amend within 20 days from date of this order. See Doyle v. University of Alabama, 680 F.2d 1323 (11th Cir. 1982); et al. In all other respects, defts' motion to dismiss is DENIED.
June 16, 1983:	Amended Complaint.
July 1, 1983:	Defts' motion to dismiss amended complaint (count I)
November 17, 1983:	RECORD OF HEARING before Hon. John H. Moore, II. Nonjury trial in open court.
November 17, 1983:	JUDGMENT ON DECISION BY THE COURT.
December 12, 1983:	Pltf's notice of appeal.

MARIANNE McEUEN, M.D., was called as a witness on behalf of the Plaintiff, and after having been first duly sworn, then testified as follows:

DIRECT EXAMINATION:

BY MR. PADOVANO:

Q. Doctor McEuen, how are you employed?

A. I'm employed by the State of Florida.

Q. All right. And in what capacity?

A. I'm an assistant director of the Community Tuberculosis Control Service of the Department of Health and Rehabilitative Services.

Q. I assume by that that you are a physician?

A. Yes, sir.

Q. Licensed in the State of Florida?

A. That is correct.

Q. How long have you been a physician?

A. In 1956, I've been a physician; yes,

sir.

Q. Have you practiced medicine regularly since that time?

A. Yes.

Q. And I take it from your position that your specialty is in the treatment of tuberculosis?

A. That is right.

Q. How long have you been involved in the treatment of the illness of tuberculosis, generally?

A. Since September 1959.

Q. Have you continuously worked in that field since that time?

A. That is right.

MR. PADOVANO: The -- I would tender Doctor McEuen as an expert. I don't see the need to go into her qualifications in detail unless counsel --

MR. HAYES: I stipulate.

BY MR. PADOVANO:

Q. Doctor McEuen, before I get into the testimony about the specifics, I'd like to ask you some general questions about tuberculosis. What -- could you tell me, generally, what type of an illness it is and what body systems it affects, if any?

A. It's an illness caused by infectious organism. It can infect any part of the body but most often if affects the lungs.

Q. Okay. And is there a typical symptom?

A. There are symptoms which are considered classical symptoms of tuberculosis, but many people with tuberculosis have minimal or no sumptoms, but there are specific symptoms.

Q. What do you generally think of as a symptom?

A. The typical symptoms of tuberculosis are cough, chest pain, weight loss,

fever, night sweats and the degree of symptoms depends upon the degree of disease.

Q. You say that it could have an effect upon the lungs. Does it have an effect upon the respiratory system in general in most cases?

A. Yes, in most cases.

Q. And is it the kind of an illness which has the potential to limit a major life function such as breathing or walking or something such as that?

A. It could, yes.

Q. Now, during the course of your practice, have you had occasion to either treat or evaluate the plaintiff, Gene Arline?

A. Evaluate, yes.

Q. And could you tell us basically the time that you evaluated her and exactly what you were reviewing.

A. I've been -- basically evaluated her since 1959, since I started my --

Q. Let me ask you this: Have you seen her personally off and on during that period of time or --

A. Not as a patient.

Q. I see. But in the sence of evaluating the status of her illness; is that it? I'm not sure of the capacity that you have had in your contact with her and that's why I'm asking you. You were her treating physician?

A. By reviewing records and examining x-rays.

Q. When would you have occasion to do that?

A. When?

Q. Yes, ma'am.

A. Periodically during her treatment and following treatment.

Q. Would that routinely be done, in the

course of regular medical checkup, that a patient such as this would --

A. Yes.

Q. -- normally do? All right. Now, did you ever see her?

A. Yes.

Q. And how many times did you see her?

A. I saw her in the hearing before the school board and I also saw her in consultation at the Health Department on one occasion.

Q. All right. And are the records kept at the Health Department there; are her records kept at the Health Department?

A. The records are kept at the Health Department in Duval County, but we have records in our office also in Jacksonville.

Q. I see. Is this customarily the case in the unit that you work in? In other words, would you have records of tuber-

culosis patients which might be duplicated also?

A. Yes.

Q. And how far back does Mrs. Arline's medical record go that you have?

A. May I refer to my records?

Q. Yes, absolutely.

A. Thank you. March 1957.

Q. And then when did you first evaluate her?

A. Me as an individual?

Q. Can you tell that from the records?

A. May 1961.

Q. All right. And how long of a period of time did you monitor the records?

A. The last record we have is June -- is May 29th, 1981.

Q. So from '61 to '80 you were regularly -- I say regularly -- not necessarily frequently, but you were reviewing those records --

A. Yes.

Q. -- from time to time? Can you determine from the records whether Mrs. Arline ever had the illness in an acute form in such a degree that it affected her respiratory system?

A. Yes.

Q. That is the case?

A. Yes, she did.

Q. Was she ever hospitalized with the illness?

A. Yes.

Q. And that appears in the records that you are referring to?

A. Yes.

Q. Now, let me ask you: During the course of your evaluation, did it appear to you at any time that there were ever any positive tuberculosis tests?

A. Yes.

Q. And could you summarize for me when

those occasions were.

A. Positive?

Q. Yes, from your record.

A. Originally in 1957 and then again in 1977 and in March of 1978 and in November of 1978.

Q. All right. Have you had occasions to -- you were, I suppose, familiar with her employment at the time that you were evaluating these records?

A. I was in 1977. I'm not absolutely certain that I was aware of her employment prior to that.

Q. All right. At any time did you have occasion to make any recommendations concerning her continued employment with respect to her -- the illness that you have evaluated?

A. Yes.

Q. And when was that and, if you will, please, briefly summarize what it was

that you had recommended.

A. It was in February, I believe, when the last culture was reported positive, which I think was February of 1979, and it was my recommendation at that time that she not continue to teach third grade students.

Q. Now, I don't wish to go into the medical basis for that in detail -- if Mr. Hayes wants to, he may -- but could you tell us just briefly why you recommended that?

A. Because small children are considered highly susceptible to tuberculosis and because the pattern of relapse suggested that there might be a possibility of further relapses.

Q. All right. When you say "the pattern," you mean the overall record of the positive tests within a certain period of time?

A. Right.

Q. Did you classify the risk of her teaching small children in any way? Did you attempt to do that?

A. Yes. I think I said I thought it was very minimal at that -- you know, from then on, at that point.

Q. Okay. So would it be correct to say that you felt that there was a very low chance that she might infect somebody, but you thought it would be safer for her not to teach third grade?

A. Essentially, I think that's what I said.

Q. I don't mean to put words in your mouth.

A. No, I think that's --

Q. Was it ever your opinion that she should not perform any other form of work for the school board?

A. Well, I can't testify as to what

other -- as --

Q. What other work she could do; I understand.

A. I mean, for who she was working for, it was my opinion she could do other things, yes.

Q. And in your opinion what other things could she do?

A. She could work with older people or people who are not what we classify as highly susceptible groups of individuals, and --

Q. Would you have any -- now, you have testified that you think that the risk of her teaching young children would be minimal but you nevertheless believe it's a risk that should not be taken?

A. Right.

Q. Would you have any hesitation at all -- would you have had any -- we're talking about back; then I realize you

don't know what the status is today -- but would you have had any hesitation to recommend that she teach high school students?

A. At that time I think that would have been acceptable, yes, sir.

Q. Now, when you say acceptable, what do you mean by that? That the risk --

A. I mean that there is always a risk, but the risk is considerably lessened in older people who are not spending all day long in the same room with the same teacher. That's what --

Q. You are in the tuberculosis control center, you are more or less -- or one of the main functions is the risk control kind of idea?

A. Right.

Q. So if there was a risk in teaching older children, it was not one that was unacceptable in your view; is that what

you are saying?

A. That was --

Q. Does the fact that elementary school children, third graders, stay in the same room all day long, have anything to do with your recommendation?

A. Yes.

Q. And what would that be?

A. The longer the period of exposure to a possible case of tuberculosis, the more likely the possibility of infection occurring.

Q. And was that a factor which contributed to the --

A. That contributed to my recommendation.

Q. If she were in a setting with older students who go from class to class, would that -- would you feel more comfortable about that in that --

A. I would feel more comfortable about

that.

Q. And with students as old as high school students you would consider the risk acceptable --

MR. HAYES: Excuse me, Judge, I think -- I have not objected. I want to object to the continuing leading nature of this question.

MR. PADOVANO: I agree that's a little leading. I'm perhaps a little anxious to help the doctor get to her other appointment but I'll --

THE COURT: Rephrase your question.

MR. PADOVANO: Yes, sir.

BY MR. PADOVANO:

Q. Let me ask the question this way: At what age would you feel that the risk would become acceptable? I realize that's a qualitative kind of thing, but--

A. That's difficult. I think when you reach a point where the children are not

in the same room all the time, the risk is much less and that, perhaps, I would think might be acceptable.

Q. Would you have any difficulty in recommending her to teach adults in night classes, for example?

A. No.

Q. Would you consider that there is any risk for her to work in the school system in a nonstructural setting where she is around other adults?

A. If she -- around -- no, I would not.

Q. Okay. Is there any reason from a public health standpoint that she could not have performed some of those jobs?

A. No.

Q. Do you know the status of her health since the positive culture in February of '79?

A. She -- the last record we have is May 29th, 1981. At that time she was

negative.

Q. Do you know whether she has had any positive tests since then?

A. I do not. I have no record of them. I assume -- since it's a reportable situation, I would assume that it wasn't.

Q. I have just a few more questions. Are there, to your knowledge, are there people who have had cases of tuberculosis in the past working in everyday life settings?

A. Yes.

Q. Are there many of those people? Are there people such as Mrs. Arline in the public school system or in other public forms of employment?

A. There are people who have had tuberculosis in other forms of employment. Other people who have had multiple relapses in teaching in the public school system, it is -- I am not aware of such a

situation.

Q. All right. Do you consider tuberculosis to be something which is necessarily disqualifying for public employment?

A. Tuberculosis in -- no, I don't; it's not, at this point, no.

Q. I asked the question in somewhat of an awkward way, but is the fact that someone has a record of tuberculosis necessarily a reason to deny public employment?

A. No, it is not a reason to deny. That in itself is not a reason.

Q. Is there any -- is there any reason that you are aware of from Mrs. Arline's personal health record to prevent her from working in a public setting other than under the conditions that you have set forth in your recommendation?

A. Wait a minute. Would you please word

that again? I was --

Q. Was there -- is there anything in Mrs. Arline's record which would lead you to believe that she should not be working in a public job other than in the setting that you would exclude her from, the third grade?

A. No.

MR. PADOVANO: Thank you. No further questions.

THE COURT: Cross-examination

CROSS EXAMINATION

BY MR. HAYES:

Q. If it please the Court.

Doctor McEuen, Mr. Padovano uses the word "public job" and I don't know what that is, so let me confine my questions to the school situation. So I understand and the Court understands, tuberculosis is infectious?

A. That's correct.

Q. How would you categorize it -- how would you categorize its infectiousness on a scale of one to ten? Is it highly infectious or minimally infectious?

A. I would say its probably medium infectiousness, if you are comparing it with something like chicken pox, for example, which is very highly infectious. In other words, everybody exposed to tuberculosis doesn't get infected, every-body.

Q. And the infectivity is largely effected through breathing; isn't that correct?

A. That is correct. Exhaling or respiration, coughing, sneezing, breathing.

Q. Also, as I understand, you spoke of cultures?

A. Yes.

Q. Is this the way medical science does

the classic diagnosis of tuberculosis?

A. That is right.

Q. And this is done in retrospect or in arrears of the disease; is it not?

A. It takes awhile for the culture to grow after the specimen is collected.

Q. How long?

A. It can take -- it can grow in two weeks, sometimes, but it -- we don't consider a culture negative for eight weeks. In other words, eight weeks after the culture is taken we report a negative culture; our laboratory reports a negative culture. We don't know that it's negative for eight weeks.

Q. So if a person were tested on the first of the month, it might well be the middle of the following month or further beyond that before it was found out that that person, six weeks ago --

A. This is right.

Q. -- had active tuberculosis?

A. That's right; it could be.

Q. In fact, it may well have been active for several months before that depending on when the next previous culture was taken?

A. That is correct.

Q. So that whatever -- whenever a person or a patient is discovered through this process, the chances are, if it's a positive culture, that that person has been infected for at least several weeks, perhaps several months?

A. Well, that's a presumption but it's a possibility, yes.

Q. Assuming the person has these tests only once a year and if the culture were taken and six weeks later proved positive we know, do we not -- and don't let me put words in your mouth -- for at least as of the date the culture was taken that

person was infected?

A. Yes.

Q. Do you consider Mrs. Arline to have a handicap?

A. To have a --

MR. PADOVANO: I object to that, your Honor. That's a legal conclusion.

MR. HAYES: Your Honor, I'd like to address the Court on that question.

THE COURT: Go ahead.

MR. HAYES: One of the burdens that the plaintiff must establish, of course, is that she is handicapped. There's been a great deal of testimony from Doctor McEuen about everything she can do. I think it's also a medical question, as well as a legal question, whether or not she's suffering from a handicap.

MR. PADOVANO: Your Honor, the only thing that comes into play is the definition of handicap and the act that we're

dealing under, and the act defines a handicap as an impairment of any major bodily function such as the respiratory system which has an impact upon the person's ability to carry on normal life functions. Now, she testifies to the facts and the Court makes the conclusion. She doesn't need to give the Court some of her own conclusions about whether the plaintiff is handicapped now or was then. I think it's a purely legal question.

THE COURT: Well, I think to some extent everybody is this room, including myself, is handicapped in some way, shape or form. I might have a sore back and that's a handicap, if I want to do certain things, or I might have a broken toe and that's a handicap. I think under the definitions of -- oh, what is it? -- 29 U.S. Code section 706, I believe it is, which is the definition of handicap, I'm

going to have to make that determination and I don't believe that in the context in which it was asked it's a proper question.

MR. HAYES: Thank you.

BY MR. HAYES:

Q. Doctor McEuen, you have indicated that a person who has had these relapses produces a pattern which is significant to the medical examiner; is that not correct?

A. Yes, I think -- right.

Q. For instance, had she been infected in 1957 and had now twenty-six years of positive cultures, it would be a different situation, would it not?

A. A positive culture?

Q. A negative culture.

A. Of negative -- yes, it would be a different situation.

Q. You testified that she's had one,

two, three, as many as four positive cultures in the last, well, certainly in the last twenty-four years, and it appears that the last three were close together. Is this significant, medically, the pattern of relapse, recurring with -- at closer intervals?

A. I -- I --

Q. Maybe I should --

A. Yes, it's a difficult question to answer.

Q. Let me rephrase this question.

A. Does this -- go ahead, rephrase it.

Q. Does the fact that there's continuing relapses as a person grows older -- first of all, is that medically significant?

A. Well, I wouldn't -- that would be, yes. That would be significant medically, I would think, people --

Q. And would the increasing --

A. I don't know whether I would draw

that conclusion from the pattern, that she was going to have continuing relapses as she grew older.

Q. Let's go up to '81. You indicated that she was seen in '57, you started evaluating her, I think, first in '61, she had a positive culture in '77, twice in '77, I believe once in '79 and a negative in '81.

A. The one that was reported positive in 1979 was obtained in November of 1978.

Q. I see, I see. Is this history, that is, history of Mrs. Arline, is that significant as far as a relapse history to you?

A. Yes, it was. At the time that I made the testimony then and -- you know, it -- back whenever that was, the last time, it -- it's -- it worried me that she might continue to have positive cultures or positive -- or relapses. This --

Q. That's what I'm getting at.

A. Right; yes.

Q. Does the fact that she's had some twenty-four years after she was first diagnosed as having the disease, does the continuation of these positive cultures, these relapses, is that significant to show that the disease is still present or at leaset it's dormant or it's present in its dormant stage?

A. I think I said -- I'll say the same thing I said before: I hope that Mrs. Arline is cured, I hope that she will never have another relapse. We are fairly confident that she probably will not. In other words, I can't say -- I know you're trying to make me say she's going to continue to have relapses, I think, and I can't say that.

Q. Of course you don't know?

A. I don't know, but I can't say. I

just -- hope that this is the case.

Q. Do you know how many years in fact she went between relapses?

A. Between the first episode and the second, it was a period of twenty years.

Q. And then they followed more closely?

A. Right.

Q. Now, you categorized the medical risk, of course, and realizing you had to make a judgment on that and I believe at the hearing before the school board, the school board made a judgment on the risk that they felt was acceptable. You indicated susceptible children and other susceptible persons, I think; is that your words?

A. Yes.

Q. That doesn't necessarily include just small children?

A. No, it doesn't necessarily include just small children.

Q. For instance, in a night school setting, as you know, there are sometimes all different types of people in night school setting --

A. Yes.

Q. -- older people, retired people --

A. Uh-huh.

Q. -- people with various other illnesses. Would that affect, depending on the makeup of those adults, say, in a given class, would that affect or perhaps affect your opinion as to whether or not they were susceptible and the risk was susceptible?

A. Well, you have to -- there is always a risk of something sometime and you have to decide what is a risk. I think the chance of there being such an individual in such a situation, the chance of Mrs. Arline becoming infectious and the chance of that person becoming infected is so

remote that I would consider it an acceptable risk.

Q. So an acceptable risk from a medical standpoint?

A. Yes.

Q. Now, the main risk or the risk that gives you most concern is small children in a confined classroom?

A. Right.

Q. Were you aware, for instance, that the only certification she holds is in elementary education?

A. I am not aware of her certification.

MR. HAYES: Thank you -- excuse me. Thank you very much, Doctor. No further questions.

THE COURT: Redirect?

MR. PADOVANO: I have no redirect.

THE COURT: All right. Doctor McEuen?

A. Yes, sir.

THE COURT: If I may just get some --

something straightened out here. Is there any immunity to tuberculosis?

A. Very little, if any, immunity to tuberculosis. Does not produce an immunity like you get from chicken pox, for instance.

THE COURT: Okay. Well, I'm not talking about someone --

A. There is some immunity in -- there is the basis for which there have been BCG vaccinations with the presumption that there may be some, but it's a very low immunity.

THE COURT: Okay. But it requires a vaccination even --

A. Well, no -- I mean, yes, it would, but there is very -- it's a very low questionable immunity. I want to make it clear it's a very low and questionable immunity.

THE COURT: Well, what I mean, basi-

cally is can a normal person walking around the street who has never been vaccinated, could they have some immunity to tuberculosis?

A. I'm sure everybody can have a natural degree of some degree of immunity, but it would -- for instance, only twenty percent of household contacts of infectious cases of tuberculosis become infected. You see, it is not -- you know, so you have got to say that some people must have some degree of natural immunity, but it's very low.

THE COURT: Okay. You said that small children were highly susceptible?

A. That is the general belief; yes.

THE COURT: Now, I assume that that's on a relative basis?

A. Yes --

THE COURT: When you say "highly susceptible," you're talking, let's say,

that twenty percent you just mentioned, that small children would more likely be susceptible than would older children or adults?

A. Yes, that's considered to be true.

THE COURT: But in any event, with everyone there is some susceptibility; is that correct?

A. That is right, yes.

THE COURT: So that whether it be adults or teenagers or small children, they're all susceptible; it's just a matter of degree --

A. Right.

THE COURT: -- of how much and the conditions under which they would be in contact --

A. Yes, yes.

THE COURT: -- with the person who is --

A. The chances of getting tuberculosis

would depend on three -- the infectiousness of the case, the length of contact and the susceptibility of the individual.

THE COURT: So there are people who are more susceptible than others?

A. Yes.

THE COURT: And that might depend on their own metabolics or metabolism or their own physiological structure?

A. Yes; right.

THE COURT: You said there was a positive test in 1957, another one in 1977?

A. Yes.

THE COURT: Another one in March of '78 and another one in November of '78, I believe?

A. Yes. There were others, a few others also in between, I think. If you're talking about positive cultures, there were -- there were a few others but that

episode was --

THE COURT: Well, my question was going to be that between 1957 and 1977, which I assumed were the only two in that period that were positive?

A. Right, uh-huh.

THE COURT: -- were other tests made which were negative?

A. Yes.

THE COURT: And how frequently were those tests made?

A. In the earlier part of the time they were probably done on -- let's see if I have a record -- they were probably done about three-month intervals and later on an annual basis, probably; I don't have a record of that. Our records are not that complete, so I'm only saying what I think is probable, but our records are not that complete, and the record which the laboratory gave me does not go back

before that period of time, does not go back before 1977.

THE COURT: Okay. One of the three factors which you mentioned was the infectiousness of the, I guess you would call it disease, that was carried by the person who had tuberculosis?

A. Pardon me?

THE COURT: I said one of the three factors with regard to others being susceptible to this is, I believe in your words, the infectiousness of the disease carried by the particular person?

A. Yes.

THE COURT: Is there any way to measure that infectiousness?

A. It's generally measured by -- you know, it's relative. If the person is positive on smear, in other words, if you examine under the microscope sputum of a person, that the person coughs up and you

can see the germs, the acid-fast bacilli, then that person would be considered more infectious than a person if you could not see the organisms on smear. It would -- presumably there would be fewer organisms present. The number of organisms or the amount of growth which occurs on the culture is also another way of estimating how infectious a person is, whether you have a whole lot of growth or just a few colonies of growth. That tells you about that one particular specimen. It doesn't really tell you about others, you see, but it's a good -- it's our best way of estimating infectiousness.

THE COURT: So all of this is somewhat inexact then?

A. That's right, uh-huh.

THE COURT: Is there any rating scale that you in your profession have to rate a particularly infectious person with

another infectious person?

A. We don't have a rating scale but, you know, I could give you an opinion, relatively speaking.

THE COURT: All right. Was Mrs. Arline rated or do you have an opinion as to --

A. No.

THE COURT: -- as to the infectiousness of her disease?

A. I have an opinion of the infectiousness of her disease and I think at the present time the possibility of her being infectious is remote.

THE COURT: But as of 1979?

A. As of 1979 the chance -- as I said then, at that point we had a group of positive cultures within the previous almost two calendar years and really three academic years which were positive which I thought was an unacceptably high risk at that time, highly infectious, not

-- in 1979, but not highly infectious, but, you know, acceptable.

THE COURT: Okay. Thank you very much, Doctor McEuen. You may be excused.

CRAIG MARSH was called as a witness on behalf of the Plaintiff, and after having been first duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. PADOVANO:

Q. Mr. Marsh, you are the superintendent of schools for Nassau County, Florida?

A. Yes, sir.

Q. And you were the superintendent of schools, '78-1979?

A. Correct, sir.

Q. During the events in question here?

A. Yes.

Q. Now, let me see if we can just cover one preliminary matter very quickly. I think we have all pretty much agreed that Mrs. Arline was dismissed at the end of

the year of '79. Is that the order that was entered ultimately reflecting the dismissal?

A. Yes, sir.

Q. Now, the date on this is somewhat later. Could you explain briefly why it took so long to get the order?

A. I don't -- I don't exactly understand what you are getting at, Mr. Padovano.

Q. Let me withdraw the question. This is the original order, I think. There were two orders, were there not, two hearings in the case?

A. Oh, yes, there was.

Q. And there was the first one in August of 1980, reflecting the dismissal, the -- for the preceding year?

A. Yes.

MR. PADOVANO: I would offer this as Plaintiff's Exhibit B.

MR. HAYES: No objection.

THE COURT: Be received.

THE CLERK: Plaintiff's Exhibit B received in evidence.

BY MR. PADOVANO:

A. Now, that -- the way that you worked, that was a year-end dismissal. She was actually terminated before the end of the year but paid to the end of the year; correct?

A. Right.

Q. So that her pay stopped as of the end of the '78-'79 school year?

A. Right.

Q. Now, she was -- she has testified that she was making twelve thousand five hundred dollars per year, is that correct, to the best of your knowledge?

A. Probably in the range, yes.

Q. And she, not being in the school, did

not seem to be aware of the increases that might be in effect there. Can you tell us how much she would have made had she been employed from that time to this?

A. An estimation? I have no way of looking -- without looking at the records, but it would be in the range of eight to nine percent per year for probably the next two to three years.

Q. Let me just ask you this without going through the precise calculation of it here because I want to move to another point: What would the least that it could be -- what would be the least amount that it could be?

A. No less than she made the year before.

Q. Multiplied by the number of years with an eight percent increase?

A. Approximately eight to nine percent

increase, yes; yes, sir.

Q. So if we were to multiply that out we would be able to figure out mathematically how much money she would have made?

A. Sure.

Q. Twelve five times eight percent each year for the years?

A. Yes.

Q. Now, let me ask you this: The order that we've referred to here, now this was obtained at your recommendation to the board; was it not?

A. Yes.

Q. And could you tell us approximately when you made that recommendation?

A. Going back in the history, in the spring of 1978 I got a letter from Doctor Lund with the State Health Department, who is located in Fernandina Beach, stating that I had stated in effect that

this was the third time that Mrs. Arline had shown up with tuberculosis -- active tuberculosis in a period -- a short period of time, and her recommendation was that she be removed from the classroom. And this was, I believe, in May 23rd or sometime around the end of school, and I went out and met with the principal prior to this particular date, or to the letter being received from Doctor Lund. I didn't personally know Mrs. Arline; I came in office in January of '77. I didn't know everybody in the school system. So I went out and talked with Mrs. Arline and verbally suspended her at that time with pay for the remainder of the school year because in -- from Dr. Lund's statement -- and it was very friendly, and told Mrs. Arline it was not because she had done anything

wrong, but due to the circumstances beyond her control felt like it would be better for the children, her and everybody concerned, that she just not come back for the rest of that particular year.

Then, in looking into the situation found that there had been, I believe, a case in the summer of 1977 and then found the record where that doctor course, I believe, had recommended later on in that year that she could come back to work, and I think that was '77-'78 school year.

Then, well, you have heard the testimony as to what happened since that time from Doctor McEuen. There was a sputum test that was taken sometime in November and it was later on, six to eight weeks later we got notification that it was positive and that -- then we suspended --

I suspended Mrs. Arline with pay until the next -- the next regular board meeting, and it was extended and subsequently led to dismissal hearing by the board and --

Q. All right.

A. Would you like me to continue?

Q. But you did make a formal recommendation to the board to dismiss Mrs. Arline?

A. That's --

Q. At the close of that year, at some point in the spring?

A. That's according to law, yes.

Q. And your specific reason for that recommendation was her illness?

A. Yes, sir, continued reoccurence of tuberculosis.

Q. Now, it is correct, is it not, that there was no other reason for her dismissal or for your recommendation to the board?

A. That is correct.

Q. In other words, you have never contended that she was a bad teacher or an incompetent teacher?

A. That is correct.

Q. Or that she had been guilty of some act of misconduct or something such as that?

A. That's also correct.

Q. Based solely on the illness?

A. Correct.

Q. Now, your recommendation in that regard, did that come about as a result of the test that Doctor McEuen described to the Court?

A. The --

Q. November of '79 -- I'm sorry, it would have been February of '79?

A. That was part of it. Complete medical condition of Mrs. Arline.

Q. Did you discuss the matter with Doctor McEuen?

A. Yes.

Q. At any time did you investigate the possibility of allowing Mrs. Arline to work in some other capacity within the school system?

A. No, sir, I did not.

Q. In other words, you made no attempt to ask the doctors whether or not she could safely teach adults or high school students; would that be correct?

A. I didn't pursue it; that's correct.

Q. All right. Just so we understand, you really didn't make any effort to accomodate her for her illness at all,

did you? In other words, you were just concerned with removing her from the classroom?

A. Yes, sir, I sure was.

Q. And it is a fair statement to say that it wasn't your intention to try to accomodate her and see if she could work in some other capacity?

A. No, sir. I was concerned about the entire school system, Mr. Padovano.

Q. But in making your recommendation, you had no concern over whether or not she could be placed in another position is what I'm asking you; isn't that corect?

A. Yes.

Q. Now, Mrs. Arline is certified in elementary education; correct?

A. That's correct.

Q. She has a continuing contract of

employment?

A. She had.

Q. She had. Been canceled at that point; correct?

A. Correct.

Q. Now, that continuing contract of employment does not require her to teach in any particular grade does it?

A. The contract does not, no, sir.

Q. In other words, under the contract -- not talking about certification yet, but under the contract she could actually teach in the twelfth grade, could she not?

A. Sure.

Q. The eleventh grade or tenth grade or any other grade; is that correct?

A. Yes, sir.

Q. Now, her certification is limited to elementary school but it is a fact, is it

not, that you have teachers teaching outside their field of certification?

A. Yes, we do.

Q. In fact, it's your position, is it not, that you would rather let somebody teach outside their field than to let them go altogether?

A. Not necessarily. It all depended upon the circumstances surrounding that particular case.

Q. All right. But you do have teachers outside their field of certification?

A. Yes.

Q. Is there a state policy that you are aware of that allows you to do that, and if so, for how long a period of time?

A. We require -- state policy -- well, the state statute says you try to get people that are certified and put them in the clasroom teaching children. It is a

local option that we are allowed to allow people without certification to go into a particular field if they will work toward certification in that field.

Q. All right. Now, Mr. Hayes had made the point with Mrs. Arline that she didn't seek to become recertified, but now it is a fact that you didn't offer her any other job in a different field to begin with, now, did you?

A. That is correct.

Q. And if you had offered her another job, let's say, teaching the twelfth grade, that she may very well have complied with your condition to seek re-certification in secondary schools?

A. That's conjecture, sir; I don't know.

Q. But in any case she didn't have a job offer to attempt to comply with from you?

THE COURT: You are getting a little

repetitious now. He didn't offer her anything else; he said he didn't.

BY MR. PADOVANO:

Q. What -- did you have other positions -- you have other positions in the school system besides elementary school positions, obviously, do you not?

A. Yes.

Q. You have some high school positions?

A. Yes.

Q. You have some adult education positions?

A. Not positions, we don't -- our adult program is part-time teaching and we don't -- do not offer numerous classes on a regular basis; at particular semesters. There may be one or two classes offered, so we don't seek positions in there. We take people who are already in the school system generally certified in the area of

the partucular adult courses being offered and it's taught at nighttime. We don't have an adult school per say as they do in larger districts.

Q. You do have a variety of non-instructional positions, do you not?

A. Yes, sir.

Q. Now, it is the case, is it not, that sometimes when you have a teacher who has to -- legally has to work but you don't prefer to have them in the classroom, that you can get them doing a job in some capacity in administration?

A. That didn't happen.

Q. Didn't happen in the case of Vashti Garrett?

A. No, sir.

Q. What was Vashti Garrett doing when she was reinstated, what was she doing?

A. She was teaching at the Fernandina

Beach Junior High School at the time when she was -- that I recommended dismissal.

Q. And then when she was reinstated what was she doing?

A. She was a substitute teacher. Full-time substitute teacher.

Q. There are some of those positions available as well?

A. No, sir.

Q. In other words, if you didn't want to put somebody in full time as a teacher?

A. No, sir. That was the first position we've had of that sort in our county and not another position available at this time. But in that case I might add that she might go through a K through 3 school today or for a week and then maybe have a 10 through 12 school or 7 through 9 school, so you never know from day to day

what particular school you're going to.

Q. Well, I understand. Let me just ask you this: It is true, is it not, that some of these positions have come open in the adult education and in the secondary education since her dismissal?

A. Oh, yes, we've had positions.

Q. And have you ever offered her any of those positions?

A. No, sir, we have not.

Q. But now you have heard Doctor McEuen testify that she could safely work in one of those positions, why haven't you offered her --

A. I also heard her testify that anybody was susceptible to tuberculosis, Mr. Padovano. You say why haven't I offered her one?

Q. Yes.

A. Yes, sir, that is -- as I was -- the

history is such that there was an appeal to the State Board of Education who reversed the Board's decision. Later on we appealed and the First District Court of Appeals in Tallahassee dismissed, upholding the Board's decision, and we're -- I, as chief administrative officer of the board, and the board, itself, are by law charged with the health, safety and welfare of children. And there is a danger. I know it's less danger according to Doctor McEuen's testimony so far as older people are concerned, but I felt like that for the benefit of the total student population and further personnel in Nassau County and the public benefit, that it would be best if -- not to continue or offer Mrs. Arline any employment.

Q. But she said as a public health pro-

fessional that she thought it would be an acceptable risk; do you disagree with her in that regard?

A. Well, hers was a medical opinion and I'm using her medical opinion too. I have a responsibility, as I said, to the school board for the health, safety and welfare and the operation of the school system, and in our opinion we don't feel like that we are to offer Mrs. Arline a position.

Q. Is there some question involved in this other than a medical question in your judgment?

A. Very definite. In the public sector or in employees of the school system, as I said twice already, that you are charged with the health, safety and welfare, not just -- not just as a -- that's state law, that the board and the

superintendent is charged with that responsibility for the protection of the children and of the employees, and that is a basis for the total action that's been taken too.

Q. All right. Let me ask you a few questions on another subject and I'll be finished with this.

On the question of Title I funding -- first, let me ask you this. Does this appear to be your Title I application, a copy of which has been introducted as an exhibit before the Court?

A. Yes, sir, it appears to be.

Q. All right. Now, are you familiar with the process of applying for Title I funding?

A. Yes, sir, I am.

Q. You have participated in that to some degree?

A. Yes, sir, quite extensively.

Q. Are you aware of any conditions that are placed upon the school district in order to receive Title I funding?

A. Yes, sir.

Q. All right. Now, those conditions that are written into your application grant, are those conditions things that you put in there or are they required by some federal regulation or --

A. Mr. Padovano, so far the testimony has been given is not exactly correct as far as Title I project is concerned.

Q. How would you correct it?

A. Well, Title I or Chapter I presently is a federal assistance program which you first receive funds based upon the number of economically deprived children in your school district. You serve those children that are educationally deprived.

Now, there is some overlapping in the two populations, but the target population first for entitlement, dollar entitlement, is economically -- economic deprivation, or serving of children is educational deprivation. Most of those children are exactly the same. However, there are certain children that are not economically deprived that do get to serve -- get the services of Title I and consequently also some of those that are economically deprived do not get the services of Title I. The reason being that once you have identified the number of economic deprived children, that's by a specific method of the number of children that are given free lunches on a given date the previous year, exact date has to be taken, that count has to be taken, gives you that number and it's so

many dollars for each child that you receive. Okay. Then for your population that is served with educational services you have to administer a test, of which the same test is given to every child in the school system because you have to make a comparison with every -- your total school population, and those who score below a certain percentile to be identified as possible Title I recipients.

So each spring -- and we use exactly the same test each spring. That test is administered to all children in the school system in grades K through 12. From those test scores we look at each grade level independently, K-1, 2, 3, 4, 5, 6, and identify those numbers of children in -- and you are controlled by the number of children you can serve,

what the total fact there is, the total dollars you get, because as a third factor that helps to control this and that is that you are allowed a specific expenditure per child. That ranges from three seventy-five to two hundred fifty dollars per child. So you have to divide that into the total allocation for the particular year to get the total number of children you can serve. Looking at the test scores you will come starting from the lowest percentile going up, ascending, you will come to a number that is a cut-off number. And those are the children that you serve in the particular program.

Now, as I said awhile ago, that test is given to every child in the school system and you have to do this. There is no separate test given to identify Title

I children. It is a CTBS test in Nassau County and that's given on a yearly basis. Now -- that's about it as far as anything else -- to answer your question at this time.

Q. I understand that. But it is true, is it not, that the Title I program may not be operating in a given school or a given classroom because there may not be students in that school or classroom who meet the need?

A. Yes, sir. But, now, the reason for not being in a particular classroom is because of administrative reasons. Now, in our particular county -- and here again to clarify some previous testimony, we do not serve anything except K through 6 students. We don't serve any junior high schools, although that some of them were identified, some of the schools were

identified as being able to receive Title I funds, and that's a long story, too, but -- so we do not serve anyone but K through 6 students. But every K through 6 school in the district that qualifies for those services -- and I believe in this year all sixty-seven schools did -- one of the schools do not now -- but all of those that qualify did have a program written, and to be acording to the federal guidelines, state guidelines, and then it was developed in-county by the Title I administrator and myself. And all the principals of those schools who would be recipients of Title I funds.

Now, for each individual school, to answer your question specifically, there may or may not be Title I students in each and every class, but that was a decision written into the program of

which the principal and only the principal had the -- could make. Some schools chose to have all students in a class as Title I, some of them told to have -- to equalize the class, classes throughout the entire school with equal number as much as possible of Title I students.

Q. I want to ask you a question about the conditions that appear to be placed upon the receipt of this money in terms of the participation of non-Title I teachers who come into contact with Title I teachers, whose conditions that are written there on the document there in front of you. First of all, who prepares that; did the school board prepare that?

A. Yes, sir.

Q. How was this prepared? Was it prepared according to some federal rule or

regulation or was this --

A. Within federal guidelines, but they give you quite --

Q. Leeway?

A. Yes, sir, they do. That is -- that was prepared by myself, Miss Holliday, who was Title I supervisor, and all the principals. Now, it could have been written a number of different ways, but that's the way we wanted it in Nassau County. The answer to your question, it is written in there that the Title I teacher shall work with the classroom teacher and his regular classroom teacher in planning for those children that she's serving in Title I. There is educational reasons for that. We don't want a program sitting over here that has no connection whatsoever with the classroom program here. Students being in Title I

program that were deficient in certain identified skills which we identify through tests, and further testing in the Title I program, it would seem less than educationally sound to let the Title I teacher be working on some kind of skills and the classroom teacher other skills. Their efforts together. And it would take some communication. And that's written in there not because of federal guidelines, state guidelines.

Q. But this is the condition that you set upon yourself for the use of this money?

A. Well --

Q. I assume?

A. Yes, sir.

Q. And you follow those conditions?

A. Not use of the money, no, sir, no, no. In the administration of the program.

Q. Of the program?

A. Okay.

Q. Okay. But did you follow these conditions that you told the federal government you would follow after you got the money?

A. Yes, sir.

Q. So, in other words, in the typical case, for example, condition G, the regular teacher -- that would be the teacher like Mrs. Arline; right? "The regular teacher will diagnose the reading difficulties of target children." That would be a Title I child; right?

A. Yes, sir.

Q. "With the aide of the Title I teacher. Conferences will be held as often as possible to develop appropriate prescriptions for the pupils to provide, by mutual agreement, day-by-day strategies for reading improvement."

A. Yes, sir.

Q. So under the conditions that you, yourself, set up, the regular teacher participates in the program daily with the Title I teacher; correct?

A. No, not in the Title I program, sir, they do not participate in the Title I program. Administratively we require the regular classroom teacher and Title I teacher to communicate with each other for the benefit of the child to try to identify those skills that the child is deficient in, and both of them can be working on those skills with different approaches and different methods. But so far as being in the Title I program, no, sir, they're not.

Q. Well, I don't know how you define in the program, but you would admit, would

you not, that they worked on a day-to-day basis with the Title I teachers to improve the reading skills that they, the Title I teachers, were working on?

A. Yes, sir.

Q. And the -- now, there's been some testimony that you have received some federal impact aid, which is the small portion of your overall budget?

A. Yes, sir.

Q. Is that correct, first of all, that testimony?

A. Yes, sir.

Q. Now, it is a fact, is it not, that a portion of that money was used -- albeit a very small portion -- to pay Mrs. Arline's salary?

A. It's put into the general fund and it's impossible to trace --

Q. It's distributed evenly among all of

the expenses. In other words, you could create a ratio from the federal funds to the total expense and you could figure out exactly how much of that money goes into each expenditure that the school board makes; correct?

A. I suppose it would be possible. It was -- let me back up a little bit, statement I just made. We don't distribute exactly like that. We have a -- the money, as has been testified here, is in lieu of taxes because of some Government installation, as an incentive to the particular school. And here again you qualify for that by taking -- they give you a date certain on that also, I think it's October 17th or something which you send out cards, impact cards to all the schools, principals of all the schools. They try to identify and send those cards

home and get the parents to fill out the cards, and which qualifies them for certain impact funds. You have several different categories. Have the category of A, B, C and D and -- no need to go into that, but I do have four categories of funding and it's different amounts of funding. As an incentive, we knew that there was a past number of students or parents who may qualify in our district that we were not getting cards filled out on, so as an incentive to try to get additional dollars like that we offered so much per card that was -- that met the criteria for funding, to be distributed directly back to the particular school, all thirteen schools in the county, and it picked our impact funds up and we've been --

Q. So -- but you when you get the funds

though there is no indication in the budget though how they are distributed?

A. Not the one that goes in the general fund, no, sir.

Q. And you can't say they go for one purpose or another, can you?

A. That is correct.

Q. So you could create a ratio of that fund to the total fund and figure out how much money was used for each expenditure in the budget now, could you not?

A. That is correct.

Q. And there would be some of that money attributed to Mrs. Arline's salary, although it would be a very small amount of money; wouldn't that be correct?

A. Yes, sir.

MR. PADOVANO: I have no further question.

THE COURT: Cross-examination

CROSS EXAMINATION

BY MR. HAYES:

Q. Mr. Marsh, as a superintendent, do you know how many school districts in Florida receive some of this federal impact aid?

A. I don't have the number, Mr. Hayes. Quite a few of them do, I know that.

Q. And I believe it was your testimony that this is merely replacements dollars, you have these monies if there were not these federal installations?

A. That is correct.

Q. So I understand it quite clearly, your testimony, you have indicated in answer to Mr. Padovano's question about Mrs. Arline's condition you felt an obligation under state law towards the population of the county, the students in the county and et cetera. Would you explain

that?

A. Well, just an obligation under state law, but a moral obligation, too, as I stated a while ago, that I am charged and so is the school board, with the responsibility for the protecting, the safety, health and welfare of students, every student in Nassau County. And the record clearly states that, you know, after all -- after the third time that I had knowledge of Mrs. Arline's recurring condition, which was infectious at the time of each reoccurrence, that I felt like it in the best interest of the school system of Nassau County that she be dismissed from the classroom.

Q. In making that recommendation, did you have input from other members of the county staff and parents?

A. Very much so, yes, sir.

Q. Was that a factor?

A. Yes, sir, very definitely was.

Q. There's been some talk about adult school and night school. What type of students does that include in your adult education?

A. Most of them are older students, I say grown people. Now, we do have some school dropouts that we will allow to come into night school, adult school, but anywhere from seventeen to fifty years old.

Q. Seventeen to age fifty. Are your elementary schools departmentalized, if you know what I mean?

A. No, sir. I think there's maybe a couple at the sixth grade may have changed classes, but primarily self-contained classrooms.

Q. Maybe the Judge knows, maybe he does

not. Self-contained classroom means what for the record?

A. That means a teacher has a -- is responsible for a classroom of students the entire day unless the students are pulled out for other types of special activities.

Q. And Southside Elementary School where Miss Arline taught was not one of the special departmentalized programs, was it?

A. That is correct.

Q. To your knowledge as superintendent of schools during -- or since 1976, has Mrs. Arline at any time been employed in any position or in any way received any funds for participation in a program that was the beneficiary or that came from specialized earmarked federal system funds?

A. She has not.

Q. What was the source of her salary?

A. General fund, state and county taxes.

Q. To your knowledge did she have any special supplements or any other positions within the county that may have received federal -- earmarked federal funds?

A. None, sir.

Q. Do you have an opinion as superintendent of schools and one being knowledgeable, I assume, in budgets and sources of revenue as to whether or not Mrs. Arline, prior to the year -- the year prior to her dismissal, was participating in a program that was a direct recipient of federal financial aid.

MR. PADOVANO: I object --

A. She was not.

MR. PADOVANO: -- first of all, because

the -- the question doesn't assume the correct statement of the law. Secondly, because it's a legal matter for the Court. I don't think this witness can give the ultimate conclusion of the case.

THE COURT: Let me hear the question.

(Question read by reporter).

THE COURT: Sustained.

BY MR. HAYES:

Q. All right. Under the Title I program, your various schools, Mr. Marsh, are all of your school personnel, including principals and other teachers, required to cooporate with the Title I program?

A. Yes, it is one of the several programs in the school; yes, sir, that is true.

Q. Does this require cooporation of all --

A. Yes, sir, it does.

Q. -- teachers and administrators?

A. Yes, sir.

Q. Are there other programs in which teachers --

A. Yes, sir.

Q. -- cooporate with no extra remuneration?

A. Yes, sir.

Q. For instance?

A. Rather extensive exceptional child education program.

Q. And how does the regular staff participate with those programs for no extra remuneration?

A. Well, we have -- some of those are self-contained programs like educable mentally retarded class would be a self-contained class in which the students would stay with the teacher the majority

of the day except for some pull-out maybe for PE and art activities. Others are part-time, and identified as part-time in which an SLD, specific learning disability child, or emotionally handicapped child, may leave the regular classroom for a period of time every day or twice or three times a week, and of course the special teacher there works with the classroom teacher to try to help that classroom teacher and be able to cope with and do a better job with the child while they are in the classroom during the period of the time.

Q. Let me ask you: To your knowledge did your predecessor or the current board, prior to your being informed by whatever the doctor's name again, Doctor Lund, was it --

A. Lund.

Q. -- was that the first knowledge you had of Mrs. Arline's tuberculosis?

A. That was my -- my first knowledge, yes, sir.

Q. Did you review her official application, her application contained in the personnel file to determine if that information was contained on her application?

A. Yes, sir.

Q. Let me hand you what's been identified as exhibit -- Defendants' Exhibit

A. Do you recognize that?

A. Yes, sir.

Q. What is that a copy of?

A. Her application for employment.

Q. You have reviewed the original application and the school file. Is that an exact duplicate, machine copy of that?

A. Yes, sir.

MR. HAYES: Your Honor, realizing we're still on the plaintiff's case, but to same time for recalling --

MR. PADOVANO: I don't have any objection.

MR. HAYES: Mr. Marsh, I would offer this as Defendants' Exhibit A at this time -- Defendants' Exhibit 1 at this time.

THE COURT: Be received.

THE CLERK: Defendants' Exhibit 1 received in evidence.

MR. HAYES: Thank you. I have no further questions.

THE COURT: Redirect examination?

MR. PADOVANO: No redirect, your Honor.

THE COURT: Pardon?

MR. PADOVANO: No redirect.

THE COURT: All right. Thank you, Mr. Marsh.

SUPREME COURT OF THE UNITED STATES

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA AND CRAIG MARSH, INDIVIDUALLY AND AS SUPERINTENDENT OF SCHOOLS OF NASSAU COUNTY, FLORIDA *v.* GENE H. ARLINE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-1277, Granted April 21, 1986

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted, limited to Question 1 presented by the petition. In addition, the parties are requested to brief and argue the following question:

> "Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being 'otherwise qualified' for the job of elementary-school teacher, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794?"

JUSTICE STEVENS, dissenting.

The Court of Appeals remanded this case for further proceedings, and concluded its opinion as follows:

> "In this case, the district court made no findings resolving the numerous factual disputes as to whether the risks entailed in retaining Arline in her elementary school position precluded her from having the necessary physical qualifications for the job, whether the same would be true if she were transferred to a position teaching less suspectible individuals, or whether the costs involved in accommodating her would place undue burdens on

> the school system. Rather, it simply concluded that the school board was exempt from any duty whatever to weigh the actual costs and risks involved in accommodating Arline because of an overriding 'duty to the public it serves.' Section 504 by its existence establishes that such a duty cannot be used to shield any entity from liability for making decisions which 'arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program.' *Southeastern Community College,* 442 U.S. at 412, 99 S. Ct. at 2370. We therefore remand this case for futher findings as to whether the risks of infection precluded Mrs. Arline from being 'otherwise qualified' for her job and if so whether it was possible to make some reasonable accommodation for her in that teaching position, in another position teaching less susceptible individuals, or in some other kind of position in the school system." App. A. to Pet. for Cert (footnotes omitted).

In my opinion, it is inappropriate for this Court to direct the parties to present argument on the "otherwise qualified" issue before the District Court has an opportunity to make the findings ordered by the Court of Appeals. It is especially inappropriate because petitioner did not seek review on that issue. Accordingly, I respectfully dissent.

Supreme Court, U.S.
FILED
JUL 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

(6)

No. 85-1277

In The Supreme Court Of The United States

October Term, 1985

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA; and CRAIG MARSH,
Individually and as Superintendent of Schools of Nassau County, Florida,
Petitioners,

vs.

GENE H. ARLINE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the contagious, infectious disease of tuberculosis constitutes a "handicap" within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 *U.S.C.* § 794.

2. Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 *U.S.C.* § 794.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. A, pp. 1-11) is reported at 772 F.2d 759. The opinion of the district court (Pet. App. C, pp. 13-16) is not reported.

JURISDICTION

The opinion of the Court of Appeals (Pet. App. A, pp. 1-11) was entered on September 30, 1985. A petition for rehearing with a suggestion for rehearing *en banc* was denied on November 8, 1985 (Pet. App. B, p. 12). The petition for a writ of certiorari was filed on January 27, 1986, and was granted on April 21, 1986. The jurisdiction of this Court rests upon 28 *U.S.C.* § 1254(1).

STATUTES INVOLVED

29 *U.S.C.* § 794 states:

> No otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...

29 *U.S.C.* § 706(7)(B) states:

> Subject to the second sentence of this subparagraph, the term "handicapped individual" means ... any invidual who (i) has a physical or mental impairment which substantially limits one or more

> of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

STATEMENT OF THE CASE

In January 1966, Respondent submitted an application to the Petitioner, School Board of Nassau County, Florida, seeking employment as an elementary school teacher (R. 46-47). The application form contained an inquiry regarding whether Respondent had any "physical defects or peculiarities." In response to this inquiry, Respondent answered "none," and otherwise failed to inform Petitioner School Board that she had been diagnosed as having tuberculosis in 1957. (R.47). Respondent was hired by the school board as a third grade teacher (R. 60-61).

Respondent suffered three relapses of her tuberculosis in the years 1977 and 1978 (J.A. 12). After the first two of these relapses, Respondent was temporarily

suspended from her teaching duties and allowed to return after her tuberculosis had been treated. (J.A. 81-82). After Respondent's third relapse, however, in November 1978, she was discharged, the decision to terminate her teaching duties being prompted by the recommendation of Dr. Marianne McEuen, a specialist in tuberculosis, who advised Petitioners that Respondent should not be teaching third-grade students. (J.A. 9-10). The question of Respondent's effectiveness as a teacher was not involved in the decision to discharge her, insofar as she was admittedly competent to perform all the day-to-day duties required of an elementary school teacher.

Respondent did not apply for, or otherwise express any real interest in obtaining, an alternative position from Petitioner School Board, either at the time of her discharge or thereafter. (R.65-67). Instead, she initially sought relief for her discharge in state administrative proceedings, contending that her discharge violated her rights under the continuing contract which she held as an elementary school teacher. These administrative proceedings ultimately resulted in a decision by the First District Court of Appeal of the State of Florida, which held that Respondent's dismissal was not a breach of her continuing contract, insofar as her tubercular condition constituted "good and sufficient cause" for her discharge. *School Board of Nassau County v. Arline,* 408 So.2d 706, (Fla. Dist. Ct. App. 1982).

Respondent then brought this action in the United States District Court for the Middle District of Florida,

seeking relief under *29 U.S.C. 794* and *42 U.S.C. 1983.* Her complaint was filed on March 23, 1983 (J.A., docket sheet) and Petitioners answered the Amended Complaint on July 1, 1982 (J.A., docket sheet). The cause came on for trial on November 17, 1983. At the trial the District Court heard the testimony of Marianne McEuen, M.D., a physician specializing in tuberculosis, who testified concerning Respondent's previous diagnosis of that disease. Dr. McEuen also described the characteristics of tuberculosis as an infectious disease which is capable of being transmitted from one individual to another by means of coughing, sneezing or other respiratory activity including simply breathing. Dr. McEuen further testified that young children are particularly susceptible to catching this disease. She continued her testimony by stating that all persons are capable of contracting it when exposed to a person who is infectious, and that there is no known immunity to the disease. (J.A. 4-11, 16-27).

Dr. McEuen's testimony at trial also included a description of the procedures which are used to diagnose tuberculosis. These involve the taking of a sputum specimen from persons suspected of having the disease and allowing the specimen to grow into a culture, which is then tested. Dr. McEuen stated that the specimen must be given six to eight weeks to grow before a definite diagnosis can be made, as a result of which there is always a possibility that the individual being tested may have been carrying the disease, and thereby subjecting others to its transmission, for a significant period of time before the presence of the disease can be retroactively determined. Dr. McEuen

testified that she had recommended to Petitioner School Board that Respondent not be allowed to continue in her elementary school teaching position, based upon the diagnosis of Respondent's tuberculosis. (J.A. 16-18).

Petitioner Craig Marsh, Superintendent of Schools of Nassau County, testified at the trial that pursuant to the advice of Dr. McEuen and other medical experts, he had recommended to petitioner School Board that Respondent be discharged from her elementary-teaching position, and that the School Board had followed this recommendation. (J.A. 81-84).

At the conclusion of the evidence, the District Court rendered an oral decision for Petitioners (Pet. App. C, pp. 13-16). That court held that Respondent had failed to prove any valid claim under 42 *U.S.C.* § 1983, since the state administrative proceedings had accorded her all the substantive and procedural due process rights to which she was entitled. (Pet. App. C, pp. 13-14). With respect to Respondent's claims under Section 504 of the Rehabilitation Act, the District Court stated:

> In this regard we have to look at the plaintiff and, first of all, decide whether she is in fact a handicapped person under the terms of that statute. And the Court hereby finds that she is not such a handicapped person. No question that she suffers a handicap and it is most unfortunate that she suffers or did suffer from this particular infectious tuberculosis, but it's difficult for this Court to conceive that Congress intended contagious

> diseases to be included within the definition of a handicapped person as that act has been implemented and decided by the various courts. I'm aware that the courts have held that alcoholism, cancer, blindness, various other things, have been determined to be handicapped persons, but it's just the Court's opinion that an infectious disease such as the plaintiff in this case had, in my opinion, does not fall within that handicapped definition. But even assuming that it did fall within that definition, then we have to look to see whether or not she is otherwise qualified. And the Court finds that she was not qualified to teach in other than elementary education. And although the school board has a local policy which does permit working out of field or out of certification for a period of time while an individual is attempting to obtain certification in the particular field in which she is working out of, there is no obligation on the part of the school to do so.
>
> Thirdly, the school board has a duty to the public which it serves, and although the risk may be less if the plaintiff were employed in teaching adults or older students who move from classroom to classroom, I cannot believe that Congress intended that school boards should not look out for the very public which it serves and would intend that a school board would keep someone in the employ who, unfortunately, suffered from such an infectious or contagious disease.

(Pet. App. C, pp. 14-15).

Respondent appealed the District Court's decision to the United States Court of Appeals for the Eleventh Circuit, which reversed with regard to Respondent's Section 504 claim. *Arline v. School Board of Nassau County,* 772 F.2d 759 (11th Cir. 1985). (Pet. App. A. pp. 1-11). The Court of Appeals held that Respondent did suffer from a "handicap" within the meaning of Section 504, and remanded for a determination by the District Court as to whether the risks of infection presented by Respondent's condition precluded her from being "otherwise qualified" for the position of elementary school teacher or some other unspecified position within Petitioners' school system.

Petitioners timely sought a writ of certiorari, which this Court granted on April 21, 1986.

SUMMARY OF THE ARGUMENT

I. THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS DOES NOT CONSTITUTE A "HANDICAP" WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. 794

A. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE STATUTE

B. THE COURT OF APPEALS' DECISION IS CONTRARY TO EXPRESSIONS OF LEGISLATIVE INTENT

Although the definitions included in *29 U.S.C. 704* (1973) are very broad, nowhere in the Act do the words "tuberculosis" or "infectious disease" occur. Looking to the definitions, it can be said that even under the broad definitions the Respondent does not suffer from a handicap. Congress could, indeed, have included infectious diseases but chose not to; nor has any court, prior to the decision on review, extended coverage under the Act to include contagious diseases.

Florida law requires children to be free from communicable diseases prior to entering public school. Therefore, an absurd result would occur should a teacher with active tuberculosis be allowed to teach disease-free children.

Historically, the legislatures of several states and the federal government have treated and considered, through various legislative enactments and court rulings, the

separate and distinct nature of contagious diseases. The overriding principle of the well-being of the general public has been, traditionally, considered paramount and sufficient reason to isolate and treat separately those suffering from contagious diseases.

II. WHETHER ONE WHO IS AFFLICTED WITH THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS IS PRECLUDED FROM BEING "OTHERWISE QUALIFIED" FOR THE JOB OF ELEMENTARY SCHOOL TEACHER, WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973 29 U.S.C. 794

The direct pronouncement by this Court in the landmark case of *Southeastern Community College v. Davis,* 442 U.S. 397 (1979), defined and clarified those instances in which an employee or claimant under 29 U.S.C. 794, Section 504, who is determined to be "handicapped", is or is not "otherwise qualified". It is now clear and no longer subject to reasonable debate that the test is whether "an otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap". *supra* at 2367.

In this case, Petitioners argue simply that a reasonable requirement for an elementary school teacher is that he or she be free of contagious diseases which reasonably might infect children who are "highly susceptible" to contagion. The District Court was correct in finding the Respondent, GENE H. ARLINE, not to be "otherwise qualified".

ARGUMENT

The Petitioners at the outset remind this Court that Respondent, GENE H. ARLINE, is not in the posture of one who sought employment and was rejected because of an alleged handicap. Rather, she was discharged from her position as a tenured teacher after three "relapses" or positive tests for the contagious disease of tuberculosis. Were this not the case and had Respondent been a job applicant who had been rejected, this case would be presented to the Court in a different light.

A great deal of testimony was adduced at the trial before the District Court as to Respondent's condition at the time of the trial. All such testimony, Petitioners argue, is irrelevant. The inquiry of the appeals court and this Court should properly have been, and is now:

> "Was the Respondent, Gene H. Arline, improperly terminated from her position as an elementary school teacher (and hence discriminated against) because of a handicap?"

The Eleventh Circuit Court of Appeals, in its reversal of the District Court, determined that the broad definition contained in the Act and in the regulations promulgated by the Department of Health and Human Services was broad enough to include tuberculosis. No party to this proceeding has at any time suggested that anywhere in the Act or in the regulations do the words "tuberculosis" or "infectious disease" occur. Simply stated, Congress was utterly silent and in all probability never considered

infectious tuberculosis in enacting the Rehabilitation Act of 1973.[1]

Petitioners now argue that a contagious, infectious disease is not a handicap within the meaning of 29 *U.S.C.* 794 (1973).

[1]Petitioners' reading of the transcripts of hearings before the various Congressional committees and subcommittees prior to passage of the Rehabilitation Act of 1973 has failed to locate any discussion, comments or questions raised as to contagious diseases in any context.

The stated purpose of Congress in passing the Rehabilitation Act of 1973 was to fully integrate the handicapped into the mainstream of American life "to the maximum extent possible." *S. Rep. No.* 890, 95th Cong., 2d Sess. 39 (1978). To that end, Congress included Section 504 as part of its overall statutory scheme. That section provides:

> No otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...

29 *U.S.C.* § 794. The Rehabilitation Act further contains a statutory definition of what constitutes a "handicapped individual" for purposes of Section 504. That definition is found in Section 7 (7) of the Act, which provides:

> Subject to the second sentence of this subparagraph, the term "handicapped individual" means ... any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in

> question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

29 *U.S.C.* § 706(7)(B).

Previous decisional law indicates that a plaintiff must allege and prove four distinct elements in order to state a claim for relief under Section 504: (1) that the plaintiff is a "handicapped individual;" (2) that the plaintiff is "otherwise qualified" for the position sought; (3) that the plaintiff was excluded from such position "solely by reason of" his handicap; and (4) that the discriminatory exclusion occurred in the context of a program or activity receiving federal financial assistance. *Southeastern Community College v. Davis,* 442 U.S. 397 (1979); *Doe v. New York University,* 666 F.2d 761, 774-75 (2d Cir. 1981). The instant case involves a consideration of the first three[2] of these elements.

In part I of this brief, Petitioners will demonstrate that the infectious, contagious disease of tuberculosis, in and of itself, cannot properly be deemed to constitute a "handicap" within the meaning of Section 504. In part II,

[2]However, as this Court has observed, although the requirements that a plaintiff show she is "otherwise qualified," and that she was excluded "solely by reason of" a handicap are sometimes separately stated as distinct elements, they are in actuality separate sides of the same coin, since a handicapped individual who is excluded from a covered program because she is not "otherwise qualified," and cannot be made so by reasonable efforts at accommodation, is not excluded "solely by reason of a handicap." *"Alexander v. Choate,* ____ U.S. ____, 105 S. Ct. 712, 720, n.19 (1985).

Petitioners will further show that even if it is assumed that this disease does constitute a "handicap," it is at the same time a condition which invariably presents such risks to the health of others, particularly small children, as to preclude its victims from being "otherwise qualified" to perform the job of an elementary school teacher. Petitioners submit that for either or both of these reasons, the decision of the Court of Appeals below must be reversed.

I. THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS DOES NOT CONSTITUTE A "HANDICAP" WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. § 794.

The Court of Appeals held that Respondent's tuberculosis constituted a "handicap" within the meaning of Section 504, due to its view that this condition fell "neatly within the statutory and regulatory framework" and its inability to find any evidence of a Congressional intent to exclude contagious diseases from the definition of a handicap. 772 F.2d at 764. (Pet. App. A, pp. 8-9). Petitioners respectfully submit that the Court of Appeals was wrong on both counts. The disease of tuberculosis does not *per se* constitute a "handicap" within the statutory definition, and to construe the term "handicap" so as to include infectious, contagious diseases is contrary to the intent of Congress, as expressed in the Rehabilitation Act and other congressional acts.

A. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE RELEVANT STATUTORY LANGUAGE.

The Court of Appeals was correct in using the language of the statute as the starting point in its interpretation of Section 504. *Southeastern Community College v. Davis, supra* 442 U.S. at 405. However, the Court of Appeals' analysis of that language was flawed, and its conclusion accordingly erroneous.

In order to quality as a "handicapped individual," as defined by Section 7(7) (B) of the Rehabilitation Act [29 *U.S.C.* § 706(7) (B)], and thus come under the protection of Section 504, an individual must demonstrate that he or she either (1) has a "physical or mental impairment which substantially limits one or more ... major life activities," (2) has a record of such an "impairment," or (3) is regarded as having an "impairment." It is evident that the requirement of an "impairment" of the affected individual is common to all these definitions. The commonly accepted meaning of the term "impairment" is a diminution in quantity, value, or strength. *Webster's New Collegiate Dictionary* 415 (1960); *de la Torres v. Bolger,* 610 F.Supp. 593, 596 (N.D. Tex. 1985). Thus, the statutory definition of the term "handicapped individual" indicates that Congress only intended to include individuals having *diminished physical or mental capabilities,* or who were perceived or regarded as having such diminished abilities, within the scope of that term. (This Court has recognized that the Act was intended to protect those who have "*other* abilities that permit them to meet the requirements of various programs," despite a "*limiting* physical or mental impairment." *Southeastern Community College v. Davis,* supra, 442 U.S. at 406-07 n.6 (emphasis added).

The definition of "impairment" does not include infectious, contagious diseases which may impair the health of others. As set forth herein, Congress never intended that the term "handicap" should include physical conditions which impair the health of others through exposure to infectious, contagious diseases.

A brief discussion of the nature of tuberculosis will serve to demonstrate that the disease, if it could be isolated, does not always carry with it a "physical or mental impairment" of the effected individual so as to qualify as a "handicap" under the Rehabilitation Act. In the most basic sense, tuberculosis is described as an "infectious disease caused by the tubercle bacillus and characterized by the production of tubercles or lesions." *See, e.g., Webster's New Collegiate Dictionary,* supra; *Webster's New World Dictionary* (2d Col. ed 1982); 2 *J. Schmidt, Attorney's Dictionary of Medicine & Word Finder* 900.24 (1971); *Merck, Manual of Diagnosis & Therapy* (R. Berkow ed. 19) describes tuberculosis as:

> *An acute or chronic infection caused by* mycobacterium tuberculosis *and rarely in the U.S.A.* by M. bovix. *it is almost always initiated by inhalation.* Pulmonary disease is most common, but disease can spread via the lymphatics and bloodstream to any other organ. *TB is characterized clinically by a lifelong balance between the host and the infection in which pulmonary or extrapulmonary foci may reactivate at any time, often after long periods of latency;* and pathologically by the formation of

> tubercles made up of giant cells and epithelioid cells, by a tendency for fibrosis to occur, and by caseation, a unique form of nonliquifying necrosis.

Id. at 112 (some emphasis added). Dr. McEuen offered a similar description of the disease at the trial below, characterizing tuberculosis as an "infectious organism" which is subject to being spread from one individual to another by various means (J.A. 6, 16).

Thus, tuberculosis in its broadest sense is essentially an infectious organism which *can* have certain physical manifestations upon those who are afflicted with it. However, whether and to what extent ar individual with tuberculosis will suffer from physical impairments as a result of the disease is by no means certain. Some individuals may be impaired, have the disease go into remission and show no apparent effects and thereafter have the disease re-surface, as with Respondent herein. As Dr. McEuen testified:

> There are symptoms which are considered classical symptoms of tuberculosis, but *many people with tuberculosis have minimal or no symptoms,* but there are specific symptoms ... The typical symptoms of tuberculosis are cough, chest pain, weight loss, fever, night sweats and the degree of symptoms depends on the degree of disease. (J.A. 6)

The disease may exist and not cause an obvious physical impairment to the individual carrying the disease. This

compounds the difficulty in diagnosing and, in fact, the danger of the disease because "an undiagnosed and untreated patient may remain in relatively good health for prolonged periods while maintaining a high degree of infectiousness." *Merck, supra* at 115.

The Department of Health and Human Services, Social Security Administration, has recognized in its regulations that tuberculosis does not always impose a serious physical impairment on its sufferers, although it can cause such an impairment in some cases. Thus, 20 C.F.R. Part 404, Subpart P, Appendix I, § 3.00(b) (1985), in defining those impairments which will qualify an individual for receipt of social security disability benefits, provides:

> *Pulmonary tuberculosis will be evaluated* on the basis of the *resulting impairment* to the pulmonary function. Evidence of infectious or active pulmonary tuberculosis such as positive cultures, increasing lesions, or cavitation is not, by itself, a basis for determining that an individual has a severe impairment which is expected to last twelve (12) months. (some emphasis added).

In short, it is evident that while certain of the individuals having tuberculosis may be obviously impaired by the disease, others may not. It is quite possible for an individual to be a carrier of the tuberculosis organism and be spreading it to others while not displaying any outward indication of a physical or mental impairment.

An absurd result, not intended by Congress, is reached if the infectious, contagious disease tuberculosis is judicially termed to be a handicap. In Florida, children between the ages of six (6) and sixteen (16) are required to attend school. Section 232.01 (1)(2), Florida Statutes (App.1) The children are thus a captive audience. Any child in Florida before entering public school must be tested for and be free of communicable diseases. Section 232.02, Florida Statutes (App.1) Florida school boards are responsible for proper attention to the health of the children enrolled. Section 230.23 (6), Florida Statutes (App. 3). Thus, the absurd result arises: A disease-free child peculiarly susceptible to contracting tuberculosis is placed in a setting with an individual having an infectious, contagious disease that can be transmitted merely by breathing. Congress, Petitioners argue, never intended the term "handicap" to be interpreted to reach such an absurd result.

In the construction to be placed upon the term "handicap", the intent of Congress is controlling. *Diamond v. Chakrabarty,* 100 S. Ct. 2204 (1980). It must be presumed that undesirable consequences were not intended.

The State of Florida is not unlike the vast majority of other states in its enactment of laws regarding the treatment of and care for persons affected by various communicable diseases including tuberculosis.[3] A brief review

[3]See Brief of *amicus curiae,* National School Board Association for survey of other state laws similar to those of Florida.

of some of those laws is now cited to demonstrate that Florida, like other states, has traditionally had a vital concern for the health of all its citizens, both those suffering from communicable diseases and those who might become infected through exposure. For instance, Florida has established separate hospitals for persons suffering from tuberculosis. (See Florida Statute 392.01). Another section of Florida law provides that one who suffers from that disease may be involuntarily confined. (See Florida Statute 395.25). Additionally, Florida has promulgated an administrative rule, Rule 6A-15.092 (App. 4) which delineates the treatment for mentally and physically impaired children in certain residential facilities. Under this rule, a qualified child prior to admittance to a residential facility, must be "free from any infectious disease." Thus, it is seen that a physically or mentally handicapped child with an infectious disease is, by law, segregated and treated in a different manner for the very obvious reason of protecting the health of fellow students in such residential facilities.

The case law construing the term a "handicapped individual" under Section 504 forcefully demonstrates that Congress did not intend every individual suffering from every perceivable kind of mental or physical impairment to be protected by the Act. To the contrary, whether such an impairment "substantially limits" an individual's "major life activities", so as to render an individual "handi-

capped" is a factual question to be determined on a case-by-case basis. *Oesterling v. Walters,* 760 F.2d 859, 861 (8th Cir. 1985). Thus, even when a person is found to have a definite physical impairment, that person will not be deemed to be "handicapped" unless the limitation imposes a *substantial* limitation on his or her major life activities. It is not sufficient to demonstrate that the impairment precludes the person from performing a particular job for a particular employer. *Id.; Jasany v. United Postal Service,* 755 F.2d 1244 (6th Cir. 1985); *de la Torres v. Bolger,* 610 F. Supp. 593 (N.D. Tex. 1985); *Tudyman v. United Airlines,* 608 F. Supp. 739 (C.D. Cal. 1984).

It is interesting to note that prior to 1985, very few decisions had been rendered where the threshold decision of "handicap" had been determined adversely to a plaintiff. The above authorities indicate that more recently the courts are apparently taking a harder look at the conditions asserted by plaintiffs to be "handicaps" and the *Jasany,* (supra), case is a good example of a federal appeals court resisting the temptation to include every illness known to humankind as a "handicap". These authorities further demonstrate that not every physical condition, even though affecting the individual in some manner in his pursuit of employment will be judicially determined to be a qualified handicap under *29 U.S.C. 794,* Section 504.

It is, indeed, perplexing to find any justification for the finding in the last paragraph of the decision by the 11th Circuit Court of Appeals. The Court stated (in

considering what the School Board had done) that it had to review the School Board's actions to determine if they were based on "... conclusory statements ... being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice." Using such a test, apparently derived from *Strathie v. Department of Transportation,* 716 F.2d 227 (3d Cir. 1983), it concluded as follows, referring to the District Court:

> "Rather, it simply concluded that the school board was exempt from any duty whatever to weigh the actual costs and risks involved in accommodating Arline because of an overriding 'duty to the public it serves'."

In short, the Court of Appeals was apparently accusing the School Board of making its finding, and the District Court of approving it, based on a knee-jerk reaction, based on some traditional "taboo" of tuberculosis. This particular finding by the Appeals Court totally ignored the fact that the Petitioners acted on the specific advice of a medical expert and only acted after the Respondent's third relapse within a seventeen (17) month period. These facts, Petitioners suggest, were overlooked or simply not considered by the Appeals Court and certainly formed the "substantial basis" for both the action of the School Board and the recommendation preceding it by Craig Marsh, the Superintendent of Schools for Nassau County.

B. THE COURT OF APPEALS' DECISION IS CONTRARY TO VARIOUS EXPRESSIONS OF THE LEGISLATIVE INTENT

The Court of Appeals' conclusion that it could find "not a scintilla of evidence" that Congress intended to exclude contagious diseases from the definition of a "handicap" as used in the Rehabilitation Act, 772 F.2d at 764 (Pet. App. A, p. 9), is erroneous. There are in fact substantial reasons for believing that Congress had precisely such an intention, and would have more clearly expressed that intention had it fully considered the matter.

In one instance, Congress chose to specifically exclude from the definition of "handicapped individuals" alcoholics and drug abusers whose current use of alcohol or drugs would constitute a threat to the health or safety of others. 29 *U.S.C.* § 706(7)(B). This exclusion is evidence of a Congressional intent to exclude individuals who, though undoubtedly suffering from a "mental or physical impairment," were thought to pose a risk to others under circumstances where even reasonable accommodation by the employer could not suffice to entirely eliminate the risk. In view of Congress' exclusion of one class of "handicapped individuals" from the protections of the act, it appears that Congress would have created a similar exclusion for contagious diseases had it considered the possible application of Section 504 to such conditions.

The fact of the matter, however, is that Congress apparently never contemplated the possibility that Section

504 would be construed so as to provide protection to persons with contagious diseases. Although the legislative history of the Rehabilitation Act is extensive,[4] there is absolutely no mention therein of the question regarding whether the Act would afford any protection to those with tuberculosis or other contagious diseases. Such an oversight is itself some indication that Congress never intended Section 504 to have any application to such individuals, *United States v. University Hospital, State University of New York at Stony Brook,* 729 F.2d 144, 159-160 (2d Cir. 1984), particularly where communicable diseases do not fall within the plain meaning of the statutory definition of a handicap, *Id.*

Had Congress desired to include contagious diseases within the ambit of the definition of handicap, it could easily have done so. *Compare, N.Y. Executive Law ("Human Rights" Law)* Section 292.21 (Consol. 1983), which defines a "disability" as a "physical, mental *or medical* impairment which . . . is *demonstrated by* medically accepted clinical or laboratory diagnostic techniques." (emphasis added). Such a definition would have undoubtedly encompassed *any illness,* regardless of whether that illness caused an actual or perceived impairment of one's mental or physical abilities.

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[4] *See, e.g., H. R. Rep. Nos.* 928, 1581, 92d Cong., 2d Sess. (1972); *S. Rep. No.* 1135, 92d Cong., 2d Sess. (1972); *H. R. Rep. Nos.* 42, 244, 500, 93d Cong., 1st Sess. (1973); *S. Rep. Nos.* 48, 318, 391, 93d Cong., 1st Sess. (1973); *S. Rep. No.* 1297, 93d Cong., 2d Sess. (1974); *H. R. Rep. Nos.* 1149, 1780, 95th Cong., 2d Sess. (1978); *S. Rep. No.* 890, 95th Cong., 2d Sess. (1978); 119 *Cong. Rec.* 18117, 24550, 29698, 30148 (1973); 124 *Cong. Rec.* 13885, 30292, 30559, 31590 (1978). (Citations to various committee hearings not included.)

However, the language finally decided upon by Congress is restricted in scope to those conditions which constitute substantially limiting physical or mental impairments. Since Congress could have expressly and unambiguously prohibited recipients of federal financial assistance from discriminating against persons with contagious diseases, but did not do so, this Court should be reluctant to impose such an obligation on federal grantees as a condition of their receipt of federal funds. *Hendrick Hudson District Board of Education v. Rowley,* 458 U.S. 176, 204 n. 26 (1982).

In short, Congress' primary concern with conditions which are (or are perceived as being) "physical or mental impairments" is demonstrated not only by the language finally decided upon by Congress, but also by the fact that Congress could have defined "handicaps" to explicitly include contagious diseases had it desired to do so. The final draft of Section 7 (7)(B), as well as its earlier versions, reflect that Congress was exclusively concerned with "impairments which had a real or perceived effect on an individual's ability to function physically or mentally". *See S. Rep. No.* 1297, 93d Cong., 2d Sess. (1974), *reprinted in* 4 *U.S. Code Cong. & Admin. News* 6373 (1974) (stating that Section 7(7) initially defined a handicapped individual as one with an impairment which substantially limited such person's "functioning" *or* one or more "major life activities", but that language regarding limitations on "functioning" was deleted as "redundant". *Id.* at 6388).

These indicia of Congress' intent, as reflected in the adoption of the Rehabilitation Act, reinforce the view that

the meaning of a "handicap" for purposes of the Act should be limited to the scope of the statutory definition itself, i.e., a real or perceived "impairment" of one's mental or physical abilities, with a resulting limitation on "major life activities". Such a definition, as noted above, does not include a carrier of a contagious disease who demonstrated no external manifestations of a physical or mental impairment.

Moreover, while the legislative intent behind the Rehabilitation Act itself may be somewhat ambiguous, there is no question that the Court of Appeals' interpretation of "handicaps" to include the contagious disease of tuberculosis creates a conflict with expressions of Congressional intent on other occasions and in other contexts. More than once, Congress has demonstrated a strong concern with preventing the spread of communicable diseases in general, and tuberculosis in particular. *See,* 42, *U.S.C.* § 264[5] (authorizing regulations to prevent spread of communicable diseases); 42 *U.S.C.* 247(b) (authorizing substantial grants to control spread of communicable diseases, including tuberculosis); 25 *U.S.C.* § 198 (authorizing Secretary of Interior to quarantine Indians having contagious or infectious diseases, including

[5]On Monday, June 23, 1986, the Department of Justice, Office of Legal Counsel, issued a lengthy opinion authored by Charles J. Cooper, addressed to the General Counsel of the Department of Health and Human Services. Since Petitioners' Brief was in rough draft form and ready for the printer, a short extension was granted by the Clerk and the materials included in this section of the Brief have been re-written to include a portion of that opinion. Petitioners especially direct the Court's attention to the treatment in that paper of the historical aspects of communicable diseases as set out in pages 39 through 44. A copy of that opinion has been lodged with the Clerk for reference.

tuberculosis); 8 *U.S.C.* § 1285 (prohibiting employment of aliens with tuberculosis and other "dangerous contagious diseases" on international airflights or vessel passages). Several executive pronouncements and administrative rules implementing these statutes have similarly recognized Congress' serious concern in controlling tuberculosis and other contagious diseases. *See,* Exec. Order No. 12452, 48 Fed. Reg. 56,927 (1983), [implementing 42 *U.S.C.* § 264(b)]; 21 *C.F.R.* § 1240.54; 42 *C.F.R.* §§ 34.2(7), 34.4. Of course, there is an inherent inconsistency in concluding, as the court of appeals did, that notwithstanding these clear expressions of Congress' repeated sanction of isolating persons with contagious diseases as a means of preventing their spread, Congress nevertheless intended to include individuals with such diseases within the protection of the Rehabilitation Act, the stated purpose of the which was to "fuily integrate" the handicapped into "the mainstream of life in America." *S. Rep. No.* 890, 95th Con., 2d Sess. 39 (1978).

In short, contrary to the Court of Appeals' view, there are in fact certain indications of a Congressional intention to exclude persons with tuberculosis and other contagious diseases from the scope of the protections granted to "handicapped individuals" by Section 504 of the Rehabilitation Act. The exclusion dealing with alcoholics and drug addicts, the failure to specifically include "demonstrable medical impairments," and Congress' response to the threat of contagious diseases in other contexts all provide support for the district court's view that it is "inconceivable" that Congress would have

intended to include contagious diseases along with other more commonly recognized "handicaps." It is therefore respectfully submitted that this Court should reverse the decision below as a result of the Court of appeals' error in holding that Respondent was, as a matter of law, "handicapped" within the meaning of Section 504.

The Court of Appeals, in reversing the Judgement of the District Court, scrutinized the Rehabilitation Act in an apparent attempt to locate language which would exclude communicable diseases. Petitioners agree with the conclusions as set forth in the memorandum of the Department of Justice *Id.* that its approach was erroneous. Since Congress was silent on the matter in drafting the Act and since the Act could have substantial impact on state agencies and the vast legislative compendium of federal and state laws, the proper approach, Petitioners suggest, is to scrutinize the language of the statutes and supporting regulations to see if a particular disease or type of physical affliction is *included.* (emphasis added) This approach would be consistent with the recent case *Bowen v. American Hospital Ass'n.,* _____ U.S. _____ (1986) and with the earlier case of *Penhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981). both which hold that unless language of Congress is clear and unambiguous, that extension of a federal regulatory act to the exclusion of state regulations and provisions cannot be presumed.

II. ONE WHO IS AFFLICTED WITH THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS IS PRECLUDED FROM BEING "OTHERWISE QUALIFIED" FOR THE JOB OF ELEMENTARY SCHOOL TEACHER, WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. 794.

The District Court in the instant case expressly found that Respondent's qualifications prevented her from being "otherwise qualified" to continue in her position. She was employed as an elementary school teacher and was only qualified for that position. The District Court as a trier of fact found that Respondent was not qualified to teach in other than elementary education. (Pet. App. C, pp. 14-15). Nevertheless, the Court of Appeals ordered a remand for an express determination as to whether Respondent's tuberculosis precluded her from being "otherwise qualified" for her job, or some other position in the school system. 772 F.2d at 765. (Pet. App. A, p. 11). However, as this Court apparently recognized in granting the Petition for Writ of Certiorari, the determination ordered by the Court of Appeals on remand is unnecessary, insofar as an individual afflicted with the infectious, contagious disease of tuberculosis is necessarily precluded, as a matter of law, from being "otherwise qualified" for the job of an elementary school teacher.

Applicable case law defines an "otherwise qualified" handicapped individual as one who is able, with or

without reasonable accommodation, to:

> perform the essential functions of the position in question without endangering the health and safety of the individuals or others.

Strutts v. Freeman, 694 F.2d 666, 669, n.3 (11th Cir. 1983); *Prewitt v. United States Postal Service,* 662 F.2d 311 (5th Cir. 1981). It is manifest from this statement of the applicable standard that a Section 504 employer may legitimately consider the health and safety of its non-handicapped employees and its clientele in determining whether a handicapped individual is "otherwise qualified."

Decisions of this Court and others make it equally clear that an employee (or potential employee) may fail to satisfy the "otherwise qualified" requirement as a result of the very same condition which renders the employee a "handicapped individual" in the first place. *Southeastern Community College v. Davis,* 442 U.S. 397 (1979); *Doe v. Region 13 Mental Health-Mental Retardation Commission,* 704 F.2d 1402 (5th Cir. 1983), *rehearing en banc denied,* 709 F.2d 712 (5th Cir. 1983), *petition for leave to proceed in forma pauperis denied,* 464 U.S. 1067, 465 U.S. 1098 (1984); *Doe v. New York University,* 666 F.2d 761 (2nd Cir. 1981); *cf., Mantolete v. Bolger,* 767 F.2d 1416 (9th Cir. 1985) (action under Section 501 of the Rehabilitation Act). Thus, in *Southeastern Community College v. Davis, supra,* this Court held that a deaf applicant for a nursing program was properly denied admission on the basis of her deafness, because she was not qualified

for the program for which she applied (or the profession to which it would lead), and could not have been made so by any reasonable efforts to accommodate her condition. This Court stated the applicable standard thusly:

> Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.
>
> The court below, however, believed that the "otherwise qualified" persons protected by § 504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap. See 574 F.2d, at 1160. Taken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be "otherwise qualified." We think the understanding of the District Court is closer to the plain meaning of the statutory language. *An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.*

> 442 U.S. at 405-06 (footnote omitted, emphasis added). The Court continued on to observe that while available means of "reasonably accommodating" the handicapped must be made in connection with the determination of whether the handicapped are "otherwise qualified," there is no obligation to make "fundamental" or "substantial" changes to a program which would compromise its essential nature as the price of rendering the handicapped "otherwise qualified" for the program. *Accord, Alexander v. Choate,* _____ U.S. _____, 105 S. Ct. 712, 720 (1985).

In *Doe v. Region 13 Mental Health-Mental Retardation Commission, supra,* the Fifth Circuit Court of Appeals applied the standards enunciated in *Southeastern Community College* to a factual situation which is in many respects strikingly similar to that of the instant case. The plaintiff in *Region 13* was a former psychiatric worker who was herself beset by psychiatric problems, consisting of depression with suicidal tendencies. Although the plaintiff was apparently an exemplary employee in most respects, her superiors were concerned that she would pass her suicidal tendencies along to her patients, and ultimately such concerns prompted them to discharge her. She then brought suit under Section 504, and the jury returned a verdict in her favor. However, the district court entered a judgment notwithstanding the verdict, on the ground that the evidence conclusively demonstrated the plaintiff was not "otherwise qualified." The Fifth Circuit affirmed, stating:

Because we find that the evidence overwhelmingly supported Dr. Stewart's action here with regard to Ms. Doe, we find that the district court did correctly grant the judgement notwithstanding the verdict.

We start with the premise that there was no evidence produced of any discriminatory animus against persons with handicaps such as Ms. Doe's. Significant testimony was presented supporting the fact that GCMHC had several employees who suffered from depression and who were undergoing psychiatric counseling, No action was shown to have been taken against these individuals because of their psychiatric problems. Further, while Ms. Doe would have us find damning the fact that GCMHC knew of her problems as early as April of 1979 and did nothing about them, we are not persuaded by this fact. Rather, it supports the defendants' contention that it was only when the problem worsened to an unacceptable level that Dr. Stewart felt that action was necessary.

In determining whether Ms. Doe was "otherwise qualified" under the Act, we believe that, in the absence of any evidence of such discriminatory animus as discussed above, we must analyze the actions by GCMHC to determine whether there was a substantial, reasonable basis for its decision. Then we must apply *Boeing Co. v Shipman* to determine whether the J.N.O.V. rendered was appropriate under this standard of review.

This standard, crucial to the analysis of employment decisions under section 504, is based on our reading of the Supreme Court's decision in *Southeastern Community College v. Davis.*

* * * *

We read this landmark case under section 504 to support a reasonable deference to the decisions made by administrators of federally funded programs so long as no evidence is presented of discriminatory intent with regard to the handicapped person. To repeat, "an otherwise qualified person is one who is able to meet *all* of a program's requirements in spite of his handicap." 442 U.S. at 406, 99 S. Ct. at 2367 (emphasis added). This assumes, of course, that "a program's requirements" are reasonable. 442 U.S. at 414, 99 S.Ct. at 2371.

That we should grant deference to Dr. Stewart's decision in this case is underscored by the nature of the problem which is involved. This is not a case involving whether an employee is able to screw nuts and bolts onto a widget with sufficient speed. No such cut-and-dried factual proof is available when dealing with the "soft science" surrounding the health or affliction of an individual's psyche. Of course we must give weight to an expert's determination where there is no showing that such determination was skewed by unlawful animus.

* * * *

We believe that in cases of this sort

where, as here, there has been no showing of discriminatory animus, and where here is uncontroverted evidence of a chronic, deteriorating situation which is reasonably interpreted to pose a threat to the patients with whom the employee must work, no violation of section 504 could reasonably be found.

Substantial, rational bases existed for Dr. Stewart's action here. He could not be expected to stand idly by, knowing that Ms. Doe's behavioral disorder might have severe consequences for all concerned. Besides the deleterious effect which suicide or an attempt at suicide would have upon Ms. Doe's patients, there was the question of the ongoing deleterious effect which her continued suicidal ideation was having upon those patients, who were susceptible and suggestible adolescents. Despite the excellent record which Ms. Doe had compiled during her employment at GCMHC, the record fully supported the fact that Dr. Stewart did not act in a discriminatory manner with regard to the termination of her employment. She had been "otherwise qualified," but there was strong and overwhelming evidence, and considered professional opinion, that she was no longer "otherwise qualified."

We therefore conclude that, viewing the evidence under the proper legal standards set forth above, reasonable men could not have differed about the validity of the decision that she was no longer qualified made by Dr. Stewart and by GCMHC, and that the granting of the judgment notwithstanding the verdict was appropriate.

704 F.2d at 1409-10, 1412.

The foregoing authorities establish that even if Respondent's tuberculosis is viewed as a "handicap" within the meaning of Section 504, Respondent could nevertheless be properly discharged on the basis of unavoidable health risks created by her condition. In other words, the Petitioners have a right, Section 504 notwithstanding, to insist upon freedom from exposing others to infectious, contagious tuberculosis as a legitimate "physical qualification" for the job of elementary school teacher, as long as that qualification is shown to be based on a real risk, and one that cannot be dispensed with without compromising the essential objectives of the school system. Petitioners submit that since the risks are indeed quite real, and could not have been eliminated by any reasonable efforts to accommodate Respondent, there was no Section 504 violation in the decision to discharge her.

It has previously been noted that tuberculosis is an infectious organism which is capable of being transmitted to anyone. More importantly, Respondent was employed to teach a captive audience of elementary school age children and young children are particularly susceptible to the disease. Respondents close contact on a day to day basis with these young boys and girls renders her not "otherwise qualified". For this reason, when Respondent was diagnosed as having tuberculosis for the third time within a period of two (2) years, Dr. McEuen recommended that she be discharged from her elementary school

teaching position, and Petitioners followed this recommendation. In so doing, Petitioners did not violate either the letter or spirit of Section 504, but instead acted only to enforce legitimate requirements of the position involved.

As previously observed, Congress and the executive branch of the federal government have recognized a substantial governmental interest in controlling the spread of communicable diseases. (pp 27, 28 *supra*). However, the federal government is by no means alone in this regard, insofar as the states have recognized and acted upon a similar interest, particularly in the context of the public schools. *See, e.g.*, § 232.032, *Fla. Stat.* (1985) (immunization against communicable disease required of public school students); *Fla. Admin. Code* § 10D-3.93 (prohibiting individuals with contagious disease from being present in "sensitive situations," which term is defined to include the school setting); *Fla. Admin. Code* § 6A-15.09(2)(C)3.a.[1] (requiring lack of contagious diseases as condition for admission to special educational programs for handicapped children); *Jacobson v. Massachusetts,* 197 U.S. 11 (1905) (upholding state's compulsory vaccination program); *Wright v. DeWitt School District No. 1 of Arkansas County,* 385 S.W.2d 644 (Ark. 1965) (upholding compulsory vaccination of students); *People v. Ekerold,* 211 N.Y. 306, 105 N.E. 670 (1914) (same); *State v. Drew,* 89 N.H. 54, 192 A. 629 (1937) (same); *Board of Education of Mountain Lakes v. Maas,* 56 N.J. Super. 245, 152 A.2d 394 (1959) (same); *Adams v. Milwaukee,* 228 U.S. 572 (1913) (upholding city ordinance requiring testing of milk for tuberculosis). In light of the recognized legitimacy of the state's interest in preventing

the spread of communicable diseases in the public schools, it cannot be gainsaid that the absence of such a communicable disease (particularly tuberculosis, which can be spread by simple respiratory activity and to which small children are particularly susceptible) constitutes a legitimate "qualification" for the job of elementary school teacher. Indeed, the First District Court of Appeal of Florida essentially so held in *School Board of Nassau County v. Arline,* 408 So.2d 706 (Fla. Dist. Ct. App. 1982), wherein it was concluded that Respondent's tubercular condition constituted good cause for her dismissal from her elementary school position.

Respondent's principal argument in the Court of Appeals was that while the Petitioners' actions may have been motivated by a legitimate objective (preventing the spread of tuberculosis), the means chosen to attain that end (discharging Respondent) constituted an ill-informed, "knee-jerk" overreaction in a manner more severe than was justified by the facts. Thus, Respondent placed her principal reliance in the Court of Appeals on decisions such as *New York State Ass'n for Retarded Children, Inc., v. Carey,* 612 F.2d 644 (2d Cir. 1979); *Strathie v. Dep't of Transportation,* 716 F.2d 227 (3d Cir. 1983); *Costner v. United States,* 31 Empl. Prac. Dec. (CCH) ¶ 33,446 (E.D. Mo. 1982), and *Pushkin v. Regents of the University of Colorado,* 658 F.2d 1372 (10th Cir. 1981). These cases do support the general proposition that an employer may not justify policies or job requirements which adversely affect handicapped individuals on the basis of a vaguely-articulated objective of preventing

potential injurious consequences to others. Instead, these cases hold that in order to justify such a policy or requirement under Section 504, the employer must demonstrate that the articulated risk is real, and that the policy itself is reasonable in light of the risks involved, and is drawn no more broadly than is required by those risks.

However, the instant case is factually dissimilar from those relied upon by Respondent, in which the risks with which the employer claimed to have been concerned were either nonexistent or exaggerated. There can be no disputing the facts that Respondent is more likely than most individuals to suffer a relapse of active tuberculosis, that small children are particularly susceptible to that disease, that in an elementary school setting these children constitute a captive audience subjected to daily exposure and that there is no available means of determining whether an individual is infectious with tuberculosis until well after the period of infectiousness has commenced. *Merck, supra* at 112-14; [J.A.16-28).

Thus, notwithstanding Respondent's attempts to characterize the risk of contagion as minimal, that risk is nevertheless real, and petitioner's actions were not the product of an uninformed layman's reaction to a misunderstood condition, but were instead based on the sound medical advice of a specialist on tuberculosis.

In light of Respondent's attempts to "second-guess" Dr. McEuen's recommendation that Respondent be removed from her elementary school teaching position,

the following language from *United States v. Shinnick,* 219, F. Supp. 789 (E.D.N.Y. 1963) is appropriate to this case:

> [T]he judgment required is that of a public health officer and not of a lawyer used to insist on positive evidence to support action; their task is to measure risk to the public and to seek for what can reassure and, not finding it, to proceed reasonably to make the public health secure. They deal in a terrible context and the consequences of mistaken indulgence can be irretrievably tragic. To supersede their judgment, there must be a reliable showing of error. The words cautioning against light use of isolation are indeed strong but the three medical men who testified manifestly shared a concern that was evident and real and reasoned . . . Their conclusion, reached in obvious good faith, cannot be challenged on the ground that they had no evidence of the exposure of Relator to the disease; they, simply, were not free and certainly not bound to ignore the facts that opportunity for exposure existed during four days in Stockholm, that no one on earth could know for fourteen days whether or not there had been exposure, and that Relator, with a history of unsuccessful vaccinations, was peculiarly in a position to have become infected and to infect others.

219 F. Supp. at 791. Although *Shinnick* dealt with a factual situation slightly different from that involved here (a decision to quarantine an individual due to possible

exposure to smallpox), its rationale is equally applicable to the instant case. Educational institutions such as the Petitioner School Board cannot reasonably be expected to act with absolute certainty when they make decisions affecting the public health and safety. They cannot and should not be limited to taking the least-restrictive approach which might arguably suffice to deal with an identified risk. *Cf., Southeastern Community College v. Davis, supra* 442 U.S. at 413 n.12 (nursing program requirements based on safety considerations were reasonable, although possibly more restrictive than other states' licensing requirements for nurses). Where the risk is real and "significant," substantial deference should be given to an employer's determination as to what "qualifications" are necessary as a means of dealing with that risk. *Doe v. Region 13, supra; Doe v. New York University, supra* 666 F.2d at 777.

Petitioners' insistence on contagion-free elementary teachers cannot be characterized as unreasonable by virtue of the fact that Respondent was allowed to teach for a period of time after her condition became known, *Doe v. Region 13, supra* 704 F.2d at 409, particularly where Respondent initially obtained her position by failing to disclose that condition. *Doe v. New York University, supra* 666 F.2d at 777. Respondent simply has not demonstrated that Petitioners acted unreasonably either in identifying her as a risk, or in opting for her removal as the only means of effectively eliminating that risk.

Admittedly, Dr. McEuen did testify at trial that Respondent's serving in other capacities within the school

system might present only a minimal risk of infection, which might be acceptable from a medical viewpoint. [J.A. 11-15]. However, Dr. McEuen never deviated from her initial recommendation that Respondent should not be teaching third-grade students. Moreover, Petitioners' failure to "consider" whether Respondent was suitable for "some other position" in the school system cannot be deemed a failure to reasonably accommodate her, where Respondent was hired as an elementary teacher (at least in part due to her nondisclosure of her condition), and never expressed an interest in any other position.

An employer's duty of accommodation under Section 504 is limited to a consideration of whether a handicapped job applicant is, or can be made to be, "otherwise qualified" for the particular position in which the applicant has expressed an interest. *Gardner v. Norris,* 752 F.2d 1271, 1281 (8th Cir. 1985). Similarly, with regard to handicapped individuals who have already been hired:

> The duty to reasonably accommodate only contemplates accommodation of a qualified handicapped employee's present position. It does not include a requirement to reassign or transfer an employee to another position. Preferential reassignment for handicapped employees was not intended by the Rehabilitation Act. The Rehabilitation Act and its accompanying regulations indicate that the law requires reasonable workplace modification or accommodation in order to allow the handicapped person to remain in that position. There is nothing in the law or

> accompanying regulations to suggest that reasonable accommodation requires an agency to reassign an employee to another position.

Carty v. Carlin, 623 F. Supp. 1181, 1188-89 (D. Md. 1985).

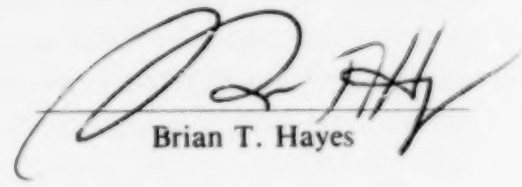
In the instant case, Petitioners did in fact "reasonably accommodate" Respondent in the position of elementary school teacher by declining to discharge her immediately upon learning of her tubercular condition. It was only after Respondent had suffered her third relapse in two years, and after a medical doctor had recommended her removal, that Petitioners took such action. By exhibiting such patience and deference to informed medical opinion, rather than immediately reacting with an intolerant and unthinking prejudice, Petitioners demonstrated full compliance with all the requirements that Section 504 can be reasonably construed to impose. Accordingly, the judgment below should be reversed.

CONCLUSION

The decision of the Court of Appeals should be reversed, with instructions to reinstate the judgment of the district court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioners Brief was furnished by U. S. mail to George K. Rahdert, Esquire, 233 Third Street North, St. Petersburg, Florida 33701, Attorney for the Respondent this 11th day of July, 1986.



Brian T. Hayes

APPENDIX 1

Florida Statute 232.01 (1)(a): (2)

232.01 Regular school attendance required between ages of 6 and 16; permitted at age of 5; exceptions. —

(1)(a) All children who have attained the age of 6 years or who will have attained the age of 6 years by February 1 of any school year or who are older than 6 years of age but who have not attained the age of 16 years, except as hereinafter provided, are required to attend school regularly during the entire school term.

(2) Beginning with the 1985-1986 school year, any child who has attained the age of 6 years on or before September 1 of the school year and who has satisfactorily completed the requirements for kindergarten in public school in accordance with the pupil progression plan of the district or in a nonpublic school from which the district school board accepts transfer of academic credit, or who otherwise meets the criteria for admission or transfer in a manner similar to that applicable to other grades, shall be admitted or promoted to the first grade. However, for the 1985-1986 school year only, any child who has completed kindergarten under the conditions outlined above and will attain the age of 6 years on or before January 1 or who has demonstrated a readiness to enter the first grade in accordance with rules adopted by the state board shall be admitted to the first grade at any time during the school year.

APPENDIX 2

Florida Statute 232.032(1); (2)

232.032 Immunization against communicable diseases; school attendance requirements; exemptions.

(1) The Department of Health and Rehabilitative Services, after consultation with the Department of Education, shall promulgate rules governing the immunization of children against, the testing for, and the control of preventable communicable diseases. Immunizations shall be required for poliomyelitis, diphtheria, rubeola, rubella, pertussis, mumps, tetanus, and other communicable diseases as determined by rules of the Department of Health and Rehabilitative Services. The manner and frequency of administration of the immunization or testing shall conform to recognized standards of medical practice. The Department of Health and Rehabilitative Services shall supervise and secure the enforcement of the required immunization. Immunizations required by this act shall be available at no cost from the local county health units.

(2) The school board of each district and the governing authority of each nonpublic school shall establish and enforce as policy that, prior to admittance to or attendance in a public or nonpublic school, grades kindergarten through 12, or a public preschool, each child present or have on file with the school a certification of immunization for the prevention of those communicable diseases for which immunization is required by the Department of Health and Rehabilitative Services and further shall provide for appropriate screening of its pupils for scoliosis at the proper age. Such certification shall be made on forms approved and provided by the Department of Health and Rehabilitative Services and shall become a part of each student's permanent record, to be transferred when the student transfers, is promoted, or changes schools.

APPENDIX 3

Florida Statute 232.23(6)

232.23(6) Powers and duties of school board.

The school board, acting as a board, shall excerise all powers and perform all duties listed below:

(Sections (1) through (5) omitted as irrelevant)

(6) CHILD WELFARE. - Provide for the proper accounting for all children of school age, for the attendance and control of pupils at school and for proper attention to health, safety, and other matters relating to the welfare of children in the following fields, as prescribed in chapter 232.

APPENDIX 4

Florida Administrative Code (1985)
Rules of State Board of Education

6A-15.09 Provision of Special Programs.

(1) All eligible students who participate in programs for exceptional students shall be provided special programs in a manner consistent with that described in approved district procedures beginning with FY 1978-79.

(2) The provision of special programs shall be structured using the following patterns so that an exceptional student shall receive instruction through any one (1) or a combination of the following:

(Irrelevant parts omitted)

(b) Non-public special day school or community facility through a contractual arrangement or other written agreement; or

1. Residential facility, as used in these rules, shall mean state operated residential institutions which exceptional students who are clients of Mental Health, Youth Services, Retardation or Social and Economic Services reside.

2. Residential facilities include:
a. Florida State Hospital
b. G. Pierce Wood Memorial Hospital
c. South Florida State Hospital
d. Northeast Florida State Hospital
e. Florida Mental Health Institute
f. North Florida Evaluation and Treatment Center

g. Youth Services: Training Schools and Start Centers
h. Sunland Centers

3. The instructional program in these residential facilities shall be structured so that an exceptional student may be provided individual instruction in the hospital or living units of these residential facilities when the student is under medical care for illness or injury which is acute or catastrophic in nature.

a. To be eligible for individual instruction in the hospital or living unit, the following criteria apply:

(1) The exceptional student is *free of infectious or communicable diseases;* ... (emphasis added).

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, *et al.*,
Petitioners

v.

GENE H. ARLINE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the contagious, infectious disease of tuberculosis constitutes a "handicap" within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

2. Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, 1-11) is reported at 772 F.2d 759. The opinion of the district court (Pet. App. C, 13-16) is not reported.

JURISDICTION

The opinion of the Court of Appeals (Pet. App. A, 1-11) was entered on September 20, 1985. A petition for rehearing was denied on November 8, 1985 (Pet. App. B, 12). The petition for writ of certiorari was filed on January 27, 1986, and was granted on April 21, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

29 U.S.C. 794 states:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. 706(7)(B) states:

> Subject to the second sentence of this subparagraph, the term "handicapped individual" means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

STATEMENT OF THE CASE

In January of 1966, Mrs. Gene Arline began work as a teacher on an annual contract for the Nassau County School Board. In 1969, the school board gave her a continuing contract (J.A.54),[1] in the nature of tenure.

In 1979, Mrs. Arline was in her thirteenth year of competent service (J.A.52) as a tenured teacher when the school board fired her. It took this action after

[1] Citation to "J.A." designates the Joint Appendix. Citation to "Tr." designates the trial transcript.

learning that Mrs. Arline had tested positively for tuberculosis three times in 1977 and 1978.

Mrs. Arline first contracted tuberculosis in 1957, at the age of fourteen. She was hospitalized at that time, but doctors subsequently advised her that she was cured. When she applied for employment with the school board in 1966, she had not shown any sign of tuberculosis for nine years.[2] Mrs. Arline had no sign of tuberculosis for the following eleven years until 1977 when she tested positively on a sputum culture. Cultures taken in March and November of 1978 also tested positively (J.A.12). She was successfully treated after the first two tests, and returned to work following leaves of absence. After she tested positively a third time, the school board placed her on leave and subsequently fired her (J.A.50-51). Although it was a policy of the school board to assign teachers to classes outside of their field of certification, this alternative was not extended to Mrs. Arline because of her handicap. She was terminated outright (J.A.56-57).

A. Mrs. Arline was terminated solely because of her illness

Mrs. Arline was fired solely because she had suffered from tuberculosis in 1957 and had three positive culture

[2] The school board makes much of an irrelevant presumption, presented as fact, that Mrs. Arline was dishonest in applying for her job by failing to disclose that she had been hospitalized for tuberculosis when she was fourteen years old. (Petitioner's brief at p. 2, 11, 41, 42) The record, however, reveals that Mrs. Arline was advised by her doctors that she was cured (Tr. 69) long before applying for the job and answering the vague, general questions on her application form. The school board's argument is irrelevant because there is no record evidence that she was fired in 1979 due to answers given in 1966.

The logical inference drawn from the school board's presentation of this information is they would have discriminated against Mrs. Arline by refusing to hire her in the first instance had they known of her handicap.

tests in 1977 and 1978 (J.A.48-52). The school board took the position that the pattern of relapses suggested Mrs. Arline may have more relapses as she ages. Trial testimony given by the superintendent of schools, Craig Marsh, revealed that he made a formal recommendation to the school board to dismiss Mrs. Arline. The superintendent testified about two reasons upon which he based his decision to recommend permanent termination: the risk of infection to others and public reaction. He characterized her illness as the "continued reoccurence [sic] of tuberculosis" (J.A.51). He had no other reason, such as incompetence or misconduct, for his recommendation, but based his decision solely on her physical condition[3] (J.A.52).

Regarding the risk of infection, the superintendent exceeded the recommendation of Dr. Marianne McEuen, the Assistant Director of the Community Tuberculosis Control Service. Dr. McEuen testified that she had considered the risk of Mrs. Arline infecting small children "very minimal" but recommended Mrs. Arline not be allowed to teach third grade students at that time because there might be a possibility of further relapses (J.A.13,14). However, Dr. McEuen rejected the suggestion that Mrs. Arline would have continuing relapses as she grew older:

> I think I said—I'll say the same thing I said before: I hope that Mrs. Arline is cured, I hope that she will never have another relapse. We are fairly confident that she probably will not. In other words, I can't say—*I know you're trying to make me say she's going to continue to have relapses, I think, and I can't say that.* (J.A.31) (emphasis added)

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[3] Nothing in the record indicates any effort by the school board to reevaluate Mrs. Arline's particular case in the four months from her April, 1979 leave until the resumption of classes the following fall.

The doctor took into account the fact that third grade students remain in the same classroom all day long. This was a factor in her recommendation because the longer the exposure to a "possible" case of tuberculosis, the possibility of infection becomes more likely (J.A.17). However, the doctor also explained that if children were not in the same room for long periods of time, the risk is much less and would be "acceptable" (J.A.18-19). Dr. McEuen did not advise outright termination, but suggested that Mrs. Arline could teach older students (J.A.15,19) or work in an administrative capacity (J.A.18-19). Any such risk to third parties while she performed those duties would be acceptable within professional risk control standards (J.A.16-18,31-34), because the chance of infecting someone was "so remote." (J.A.33-34)

The doctor testified that suffering from tuberculosis is not in itself a sufficient reason for general disqualification from "public employment" (J.A.21). To the question of whether there was anything in Mrs. Arline's record which would lead her to believe that Mrs. Arline should not be working in a public job other than in a third grade setting, the doctor answered "No" (J.A.22).

Dr. McEuen testified that the last record the Community Tuberculosis Control Service had for Mrs. Arline was May 29, 1981, and at that time she was negative (J.A.19-20). Dr. McEuen did not know whether Mrs. Arline has had any positive tests since that date. She stated "I have no record of them. I assume—since it's a reportable situation, I would assume that it wasn't" (J.A.20). Mrs. Arline testified that the last time she had a positive test was the test in 1979 (Tr.65). The last time she was required to go through a test to determine the presence or absence of tuberculosis was in the summer of 1981. She is no longer scheduled to go back periodically for these continuing tests (Tr.76).

The second factor which caused the superintendent to recommend termination was the lay reaction expressed by parents and school board personnel.[4] When asked if in his judgment there was some question involved other than a medical question, the superintendent responded "[v]ery definite [sic]. . . ." (J.A.63). Another portion of his testimony on this point, which was overlooked by the Petitioners and all *amici* for the Petitioners, is most critical and is set forth below:

> Q. In making that recommendation, did you have input from other members of the county staff and parents?
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> A. Very much so, yes, sir.
>
> Q. Was that a factor?
>
> A. Yes, sir, very definitely was.

(J.A.81-82).

B. The school board made no effort to accommodate Mrs. Arline

The school board failed "even to consider whether reasonable accommodation could be made . . ." for Mrs. Arline's handicap. *Arline v. School Board of Nassau County*, 772 F.2d 759, 765 (11th Cir. 1985). On that issue, the Superintendent's testimony was clear:

> Q. Did you discuss the matter with Dr. McEuen?
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> A. Yes.

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[4] During the administrative hearing before the school board, the superintendent testified that "the community was quite upset," that he had received verbal and written complaints, and that people feared Mrs. Arline's tuberculosis might be spread throughout the air conditioning system. The hearing transcript was admitted as Exhibit E at trial (Tr.59) but exhibits were not transmitted with the record on appeal by the district court clerk's office. (Pl. Ex. E; 16-18).

> Q. At any time did you investigate the possibility of allowing Mrs. Arline to work in some other capacity within the school system?
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> A. No, sir, I did not.
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> Q. In other words, you made no attempt to ask the doctors whether or not she could safely teach adults or high school students; would that be correct?
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> A. I didn't pursue it, that's correct.

(J.A.53).

According to the superintendent, Mrs. Arline's continuing contract of employment did not require her to teach in any particular grade. Under her contract, she could teach in the tenth, eleventh or twelfth grade (J.A. 55). Mrs. Arline's certification was "K through 6" elementary education. (J.A.54)[5] However, under local board policy Mrs. Arline could have taught at the high school level even though her certification was in elementary education (J.A.54-55). In fact, as the trial court found, the Board had a policy by which teachers taught outside their field of certification (Tr.109).

Since Mrs. Arline's dismissal, positions in both secondary and adult education became available, but the Board did not offer any of them to Mrs. Arline (J.A.61) despite the fact that she has not had a positive test since 1979 (Tr.65). The system also has a variety of non-instructional positions (J.A.59), none of which had been offered to Mrs. Arline (J.A.61).

The superintendent testified that Mrs. Arline was not offered any other position with the board because there was some perceived danger involved, and he "felt" that it would benefit the public to terminate her (J.A.62). He acknowledged the doctor's expert testimony that the danger of infecting others was so low that it would be

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[5] The school board did have elementary schools in the system where sixth grade students rotated classes, which would eliminate the problem of prolonged exposure. However, this was not explored as an accommodation of Mrs. Arline's impairment (J.A.82-83).

an acceptable risk to allow Mrs. Arline to teach older students and adults (J.A.62-63). Nonetheless, he stated that despite that medical opinion, his own opinion was that he did not feel that he had to offer her a position because of his responsibility to protect the other students and employees (J.A.63-64). He did not explain why the board had permitted Mrs. Arline to return to work after she had been successfully treated in conjunction with the first two tests, but peremptorily fired her after the third test. However, a close reading of his testimony (J.A. 51,81) reveals that after he discovered Mrs. Arline had tested positive a third time, he concluded that she would suffer from continued recurrences of tuberculosis:

> [Y]ou know, after all—after the third time that I had knowledge of Mrs. Arline's recurring condition, which was infectious at the time of each reoccurrence, that I felt like it in the best interests of the school system of Nassau County that she be dismissed from the classroom (J.A.81).

Since her dismissal by the school board in 1979, Mrs. Arline has not been employed even though she has attempted to look for employment (Tr.65). She testified that she has been unable to obtain a teaching position in Duval County, a neighboring school district:

> Well, more recently I've tried to obtain a teaching position here in Duval County, but I haven't been able to because I cannot get references from Nassau County, and this is the only thing that's holding up my application here (Tr.66).

C. Proceedings below

Mrs. Arline had two adversarial hearings before the school board, which resulted in terminations in both cases. She filed an administrative appeal of her dismissal to the State Board of Education.[6] The State Board

[6] The Florida State Board of Education consists of the Governor and the Members of the Cabinet. Fla. Const. art. IX § 2. The Cabinet is composed of the Commissioner of Education, the Secretary of State, the Attorney General, the Comptroller, the Treasurer, and the Commissioner of Agriculture, Fla. Const. art. IV, § 4.

adopted the findings of a hearing officer that there was no substantial competent evidence in the record to support the school board's finding. They rejected the Nassau County School Board's termination order and ordered Mrs. Arline be reinstated with back pay. (J.A.61-62) The school board appealed the State Board's decision to the Florida First District Court of Appeal, which by a 2-1 vote reversed the State Board's decision and reinstated the decision to terminate Mrs. Arline. *School Board of Nassau County v. Arline*, 408 So.2d 706 (Fla. 1982) Dist. Ct. App.[7] The dissenting judge would have affirmed the State Board's final order because, under Mrs. Arline's continuing contract of employment, there was no authorization to allow the board to discharge her for physical incapacity caused by personal illness. *Id.* at 709 (Ervin, J., dissenting).

On March 23, 1982, Mrs. Arline commenced an action in the United States District Court for the Middle District of Florida, alleging, *inter alia*, that her termination was a violation of Section 504 of the Rehabilitation Act of 1974. After a brief bench trial on November 17, 1983, the court issued an oral ruling against Mrs. Arline on all counts (Tr.107-110). Although acknowledging that Mrs. Arline had an unfortunate handicap, the court ruled that because tuberculosis was an infectious disease, it is not a handicap within the meaning of the Rehabilitation Act. The court also found that although the school board had a policy which permitted teachers to work outside their fields of certification, they were not under an obligation to do so and had no duty to keep a person with a contagious disease employed.

Mrs. Arline appealed this decision to the United States Court of Appeals for the Eleventh Circuit, which reversed

[7] However, the majority stated that it might not have reached the same conclusion had they been sitting as the school board. 408 So.2d at 708.

and remanded the district court's decision. *Arline v. School Board of Nassau County*, 772 F.2d 759 (11th Cir. 1985). The appellate court ruled that the language of the statute and the applicable regulations show that tuberculosis constitutes a handicap within the meaning of the Rehabilitation Act. Additionally, because the district court did not make any factual findings as to whether Mrs. Arline was otherwise qualified, or whether the costs involved in accommodating her would place undue burdens on the school system, the Eleventh Circuit remanded the case for further findings on this "fact-specific" issue. *Id.* at 764. On remand, the Eleventh Circuit directed the district court consider whether the board's "justifications . . . are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice," *Id.* at 765. This Court subsequently granted the school board's petition for writ of certiorari, and Mrs. Arline's motion for leave to proceed *in forma pauperis*.

SUMMARY OF THE ARGUMENT

The petitioner school board is not entitled to discriminate against Mrs. Gene Arline with impunity by terminating her after 13 years of competent service because she suffers from tuberculosis. Teh petitioner is a federal grantee subject to the requirements of the Rehabilitation Act, which prohibits discrimination against "any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment." 29 U.S.C. 706(7). Mrs. Arline's tuberculosis is a substantially limiting impairment and has been regarded as such by the school board.

Longstanding regulations also establish that impairments of the respiratory system and impairments of life activities including breathing and working are handicaps. Tuberculosis is clearly a handicap for Mrs. Arline.

Legislative history demonstrates that Congress acted to prevent discrimination founded on fear, prejudice, ignorance or stereotype. Certainly medical information demonstrates that tuberculosis, like other handicaps, cannot be correctly understood or accommodated by reference to stereotypic assumptions. The statute and its history simply do not countenance the *per se* exclusion from the Act of those impaired by an infectious or contagious disease. The United States Government and the school board are erroneous in their contention that contagion is separable from the underlying disease, and therefore discrimination based on an ignorant fear of contagion is outside the scope of the Act. This analysis does violence to the statutory purpose of eradicating prejudice, fear and ignorance in assessing the abilities of the handicapped. Rather, Congress intended to maximize employment opportunities through a system guided by medical fact, analyzing on a case-by-case basis the actual medical circumstances of each handicapped individual.

The Court does not need to reach the issue of whether Mrs. Arline is "otherwise qualified" to work in the Nassau County school system. While the board had a policy allowing teachers to teach out of certification, this alternative, which is available to the nonhandicapped, was not considered in Mrs. Arline's case even though the undisputed medical testimony demonstrates that teaching older students would be "acceptable."

The question of whether a handicapped person is otherwise qualified is fact-specific, determined by whether reasonable accommodations will enable the handicapped to make productive contributions. The school board did not consider accommodating Mrs. Arline's handicap before firing her and did not rebut her prima facie showing of the availability of reasonable accommodations. The district court made no findings on this issue, and the Eleventh Circuit properly remanded for further proceedings.

ARGUMENT

I. TUBERCULOSIS IS A HANDICAP WITHIN THE MEANING OF THE REHABILITATION ACT

A. General Background on Tuberculosis

Before examining the legal principles which demonstrate that tuberculosis is a handicap, it is helpful to address the most salient characteristic of the disease itself.

The record concerning the disease of tuberculosis is, frankly, quite thin and is disputed by various *amici*. For this reason the Eleventh Circuit's order of remand seems appropriate. The record does indicate what accepted medical treatises demonstrate: that the disease is not highly contagious and contagion varies with each individual; that there are means available to test contemporaneously; that treatment is effective and promptly eliminates contagion.

Tuberculosis is a disease which affects major life functions. It primarily affects the respiratory system, and includes such symptoms as cough, chest pain, weight loss, fever and night sweats. The extent and nature of symptoms depends upon the degree of the disease. It has the potential to limit a major life function, such as breathing, walking or working (J.A.7; Brief of the American Medical Association as Amicus Curiae in support of Petitioners at 6 (hereinafter cited as AMA Brief)).

More than fifteen million Americans are infected with the tuberculosis germ. (AMA Brief at 5; Brief of the American Health Association, American Civil Liberties Union, American Nurses Association, and National Association of Protection and Advocacy Systems as Amici Curiae in support of Respondent at 5 (hereinafter cited as APHA Brief)). However, only a small percentage of these infected people actually develop the disease and become capable of transmitting the infection to other

people (AMA Brief at 5). Among those people who are capable of transmitting the disease, the degree of contagiousness varies from case to case (AMA Brief at 6).

According to modern medical knowledge, the disease is not considered to be highly infectious (J.A.16; APHA Brief at 9). The level of contagiousness varies case by case and depends upon a number of interrelated factors. The number of bacilli in the diseased person's sputum,[8] the closeness and length of contact, and the presence or absence of ventilation and sunlight all determine whether there is a risk of infection from a person who has developed the active disease of tuberculosis (J.A.38; AMA Brief at 5-6; APHA Brief at 2-3).

There are two medical tests in use to determine whether a person infected with the tuberculosis germ is contagious. The classic method of diagnosis is by culturing the bacteria, which takes several weeks (J.A. 23-26; AMA Brief at p.5; APHA Brief at 13-16). The other method of diagnosing infectiousness is by microscopic examination of a stained sputum smear to detect the number of bacilli present (J.A.40-41; APHA Brief at 13-14; AMA Brief at 5). The test is performed by having the person cough up and the sputum is placed under a microscope. If the germs (the acid-fast bacilli) are present, which are visible under the microscope, that person is considered infectious (J.A.40-41). The sputum smear can be examined immediately so that no delay is necessary (APHA Brief at 13).

People with the disease of tuberculosis are no longer quarantined or isolated (AMA Brief at 6-7; APHA Brief at 12, 17-18). When properly treated with drugs, people with the disease of tuberculosis become noninfectious

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[8] During the administrative hearing, the doctor agreed with the statement that Mrs. Arline's last test showed the lowest number of bacteria one could have in a culture and still be positive. (Pl. Ex. E; Tr.59, p.46). *See supra* p.6 note 4.

within a period of time of a few days to a few weeks (AMA Brief at 7; APHA Brief at 8). Those people with the disease tuberculosis can return to work immediately after an examination if there is no bacteria microscopically detected in the sputum (AMA Brief at 7).

B. Under the clear language of the Act, people with the handicap of tuberculosis are protected against discrimination

"The starting point of any inquiry into the application of a statute is the language of the statute itself," *United States Department of Transportation v. Paralyzed Veterans*, 106 S. Ct. 2705, 2710 (1986); *North Haven Board of Education v. Bell*, 456 U.S. 512, 520 (1984). It is difficult to conceive of more expansive language that the statutory definition of a "handicapped person" under Section 504. The Act protects:

> any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment.

29 U.S.C. 706(7).

Posed against this sweeping language is the complete absence of any exclusion of a contagious impairment. The language of the statute is unambiguous. The inclusive term "physical impairment" is not limited in any manner and there is no suggestion from the plain meaning of the statute that contagious diseases are not covered. In addition to the clear meaning of the language of the statute, there are other reasons why this Court should not adopt the school board's request to judicially exclude from the coverage of the Act those whom Congress did not.[9]

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[9] In *Bowen v. American Hospital Ass'n*, 106 S.Ct. 2101, 2126 (1986) three members of this Court rejected a proposal to engraft a judicially created limitation—age in that case—onto the Rehabilitation Act. "There is no reason for importing an age limitation into the statutory definition . . . ." (Justices White, Brennan and O'Connor, dissenting.)

Congress intended the Rehabilitation Act to serve a broad remedial purpose. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984). Because the Act is remedial in nature, this Court's plain reading of the statute is guided by the same principles underlying construction of Title IX of the Civil Rights Act. A judicially created broad, automatic exemption of any person who has a contagious disease would be contrary to these previously enunciated principles.

Congress intended Section 504 to be "part of the general corpus of discrimination law." *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644, 649 (2d Cir. 1979). *See also Bell*, 456 U.S. at 521. Congress enacted the Rehabilitation Act of 1973 soon after the Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which held that once a plaintiff has established a *prima facie* case of discrimination under Title VII of the 1964 Civil Rights Act, the burden of proof shifts to the defendant to rebut that assertion. The Second Circuit noted that "Congress must have been aware that the discrimination law language would have obvious implications for the burden of proof issue." *Carey*, 612 F.2d at 649 n.5. Additionally, Section 120 (a) of the 1978 Amendments to the Rehabilitation Act makes the rights, remedies and procedures available under Title VI of the Civil Rights Act of 1964 applicable to Section 504 of the 1973 Rehabilitation Act. This reveals that Congress intends the burdens of proof under Section 504 be treated as are those in other discrimination actions.

As the Court of Appeals ruled below, Mrs. Arline's suffering from tuberculosis fits "neatly" into the statutory framework of Section 504. *Arline v. School Board of Nassau County*, 772 F.2d 759, 764 (11th Cir. 1985). Tuberculosis is unquestionably a physical impairment

within the language of Section 504 as a "physiological disorder" "affecting" the lymphatic and respiratory systems (J.A. 7; AMA Brief at 4-8). Congress has expressly provided that "respiratory or pulmonary dysfunction can constitute a " 'severe handicap' " 29 U.S.C. 706(13) for purposes of targeting vocational rehabilitation services to those who need them most. Clearly, tuberculosis is a respiratory or pulmonary dysfunction, AMA Brief at 4 and the intensity of the disease itself would determine whether it is a handicap or a severe handicap. Therefore, if tuberculosis is a "severe handicap" under the statute, it logically follows that a case of tuberculosis which impairs life functions, or is regarded as such, is also a handicap under the statute.

At the time of Mrs. Arline's hospitalization, her impairment substantially limited her ability to breathe, as it later affected her ability to work (J.A.11). 29 U.S.C. 706(7)(B)(i). Both are major life activities as defined by Section 504. *See E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088 (D. Hawaii 1980). Mrs. Arline was hospitalized as a youth as a result of her tuberculosis (J.A. 11), and thus "has a record of" this impairment. 29 U.S.C. 706(B)(ii). Certainly she "is regarded as having" the impairment of tuberculosis, 29 U.S.C. 706(B)(iii) by a school board which fired her in part due to irrational fears of parents and school personnel, and thereafter did not provide her a job reference. Therefore, as an adult, her record of tuberculosis has continued to substantially limit her ability to be gainfully employed (J.A.66), even though she has not tested positive since 1979 (J.A.20; Tr.65).

Adoption of the board's automatic exemption of communicable disease (and discriminatory behavior based on fear of contagion) from the Act's coverage would render its language meaningless and sanction decisions which are based on fear. The statutory scheme protects not only people suffering from an impairment, but also those who have a *record* of impairment, or are merely

regarded as having an impairment. *Per se* exclusion of people with contagious diseases or who engender fear of contagion would totally eviscerate subsections 706(B)(ii) and (iii) of the Act by precluding coverage of those who at one time in their lives suffered from a contagious disease, but no longer do. Such an exclusion would also preclude coverage of those whose impairment is not contagious, but merely thought to be.

C. The legislative purpose and history of the Act support the ruling that persons with tuberculosis are "handicapped individuals"

The board seeks to justify its action in discharging an employee solely because of her physical condition by arguing that she is not covered at all by an Act which Congress enacted "to promote and expand employment opportunities" for the handicapped. 29 U.S.C. 701(8); *Consolidated Rail*, 465 U.S. 624 (1984). The board argues that because contagious diseases were not considered by Congress, this Court should infer exclusion of such impairments. The argument ignores the obvious, that Congress avoided undertaking an exhaustive listing of covered impairments; none are catalogued by the statute. Moreover, the clear legislative history demonstrates that Congress has previously considered and rejected the fundamental premise of the board's argument that a perceived safety risk justifies categorical exclusion of certain handicapped people.

This Court has frequently looked to the legislative history of Section 504 to resolve questions of its coverage; *e.g., Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 718-19 (1985); *Consolidated Rail*, 465 U.S. at 624; 104 S.Ct. at 1254 n.13. ("[L]anguage as broad as that of Section 504 cannot be read in isolation from its history and purposes.") A review of that history [10] demonstrates

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[10] A detailed analysis of the legislative history of Section 504 is presented at 18-45 in the Brief of Senators Cranston, *et al.*, and

that Congress resolved to protect impaired persons from discrimination based on irrational misconceptions. Congress was aware that handicapped people suffer discrimination based on widespread myths concerning their limitations, the fear of the perceived risks which their impairments present, outright aversion to how handicapped people look or act, or what non-handicapped people otherwise thought was obnoxious about a particular disease or impairment. *See* 117 Cong. Rec. 45974 (1971) (Remarks of Sen. Vanick) (Discussing fears of the physical threat presented by a cerebral palsied child, and exclusion of a child from school because teacher thought his physical appearance "produced a nauseating effect" or "disturbing influence" on classmates). "Individuals with handicaps are all too often excluded from school and educational programs, barred from employment or are underemployed because of archaic attitudes and laws. . . ." S. Rep. 93-1297, 93d Cong., 2d Sess. (1974). *See also* Congressional Brief at 28, 42-44 for other examples.

Congressional action since the Act's initial passage in 1973 reflects the intent of the legislations to broaden, not narrow, the scope of those protected. When the Act was first passed in 1973, the definition of handicap was narrowly set forth to cover only those with physical or mental disabilities which resulted in a substantial handicap to employment. In 1974, a new definition replaced one which Congress found "far too narrow and constricted. . ." S. Rep. 93-1297, 93rd Cong., 2d Sess. (1974) to include all those who suffer from discriminatory practices in employment on the basis of either an actual or perceived condition. 120 Cong. Rec. 30531 (1974) The new definition included all those who suffer from discriminatory practices in employment on the basis of an actual or perceived condition. *See also* Congressional Brief at 29-33.

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of Representatives Atkins, *et al.*, as Amici Curiae in support of Respondent (hereinafter cited as Congressional Brief).

In 1978, Congress debated the issue of whether drug addicts and alcoholics should be excluded from the definition of handicapped person, and refused to adopt a blanket exclusion.

In response to safety concerns, the House passed a bill which excluded drug addicts and alcoholics from the definition of a handicapped person. A Senate bill, which was later adopted by both bodies, declined to adopt the House's blanket exclusion of specific groups of handicapped people. Instead, the Senate bill merely clarified that employers could not discriminate against handicapped people who were qualified. 124 Cong. Rec. 30322-30325 (1978). *See also* Congressional Brief at 19-22. Based on this history, it is obvious Congress decided that safety concerns should be considered only within the context of determining whether a person is "otherwise qualified," not whether the impairment falls within the definition of a "handicap."

This rationale is applicable in this case. Any safety concerns presented by the possibility that a person has a disease which may become contagious does not justify a blanket exclusion of all people with contagious diseases from the definition of "handicap." Rather, the possibility of contagiousness relates to whether the person suffering from such a disease is "otherwise qualified."

Finally, the board contends that the absence of the precise term "contagious disease" from the definition of "handicap" means Congress intended to exclude such diseases. That reading is precisely the opposite of what Congress adopted. The 1977 HEW regulations make clear that the "definition [of handicap] does not set forth a list of specific diseases and conditions that constitute physical or mental impairments *because of the difficulty of ensuring the comprehensiveness of any such list. . .*" 45 C.F.R. Pt. 84, App. 310 (emphasis supplied). As this Court recognized in *Consolidated Rail*, 465 U.S. at 634-635, "the responsible congressional committees partici-

pated in the formulation, and both these committees and Congress itself endorsed the regulations in their final form." Contrary to the school board's argument (Petitioners' Brief at 24), the absence of specific language including contagious diseases under Section 504 does not suggest an intent to exclude. If that were so, virtually all handicaps would be excluded. Rather, this lack of specificity is consistent with congressional concerns about the difficulites inherent in attempting to exhaustively list all impairments to be covered by the Act.

D. Under the applicable regulations, tuberculosis is a handicap

The regulations are "an important source of guidance on the meaning of § 504." *Choate*, 105 S.Ct. at 722 n.24 (citing *Consolidated Rail*, 465 U.S. at 624).

The broad coverage mandated by Congress has been interpreted equally broadly by the federal agencies responsible for implementing the Act. Long before articulation of the Government's novel theory, discussed at 26-29 *infra*, its own agencies adopted very broad, inclusive regulations. The Department of Health, Education, and Welfare promulgated rules governing entities receiving federal financial assistance from that department,[11] and provided that in determining who is a handicapped person:

> (i) 'Physical or mental impairment' means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; *respiratory*, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic; lymphatic; skin; and endocrine; or (B) any mental or phychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. (ii) 'Major life activities' means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, *breathing*, learning, and *working*. (emphasis added.)

45 C.F.R. 84.3(j).

[11] HEW was the agency charged with coordinating enforcement of the Act at the time its regulations were adopted. *Consolidated Rail*, 465 U.S. at 627.

Regulations adopted by agencies charged with administration of the Act continue to provide the definition quoted above,[12] and are entitled to deference by the Court. *Consolidated Rail*, 465 U.S. at 624; *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979). As in the Act, the agency regulations do not exclude persons who are impaired by a disease which is infectious at some point in time from the definition of "handicapped." [13]

E. Case law supports the ruling that tuberculosis is a handicap within the meaning of the Rehabilitation Act

Mrs. Arline's contention that tuberculosis is a disease which substantially limits one or more major life activities has not been seriously challenged by the school board. Dr. McEuen testified that the disease can limit

[12] The school board received its federal funding from the Department of Health, Education and Welfare during the 1978-79 school year (Tr.45, Pl. Ex. C, Tr.59). Responsibility for disbursement of the funds was transferred to the Department of Education in 1980 by Executive Order No. 12212, 45 Fed. Reg. 29557, pursuant to the Department of Education Organization Act, 20 U.S.C. §§ 3441 and 3507. The Department of Education's rules are identical to the cited HEW rules, and are contained in 34 C.F.R. Pt. 104. The HEW regulations have also been adopted by the Department of Justice, which took over responsibility for coordinating agency implementation of the Act. *See* Executive Order No. 12250, 45 Fed. Reg. 72995 (1980) and 46 Fed. Reg. 440686 (1981). *Consolidated Rail*, 104 S.Ct. at 1254 n.14.

[13] Not surprisingly, the Social Security Administration includes infectious tuberculosis as an impairment in its regulations, 20 C.F.R. 404, Subpt. P, Appendix I, 3.00(B).

a major life function, that it affects the respiratory system in general, and that it includes such symptoms as coughing, chest pain, weight loss, fever and night sweats (J.A.6-7). The school board did not dispute this testimony.

This Court has noted the remedial nature of the Rehabilitation Act [14] and held that its provisions are to be accorded a broad construction in order to effectuate its purpose. *Consolidated Rail*, 465 U.S. at 624. In keeping with the broad coverage and remedial purposes of the Act, courts have concluded that there are a variety of afflictions which are handicaps within the terms, of the Act: blindness [15]; hearing impairment [16]; diabetes [17]; dyslexia [18]; Hodgkin's Disease [19]; heart condition [20]; and even unusual sensitivity to tobacco smoke [21]; among others. Mental or emotional disorders have also been found to warrant coverage, including schizophrenia [22]; depression [23]; and retardation.[24]

[14] The Act is patterned after Title VI of the Civil Rights Act. The language of § 504 is quite similar to 42 U.S.C. 2000d-2000e.

[15] *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981).

[16] *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

[17] *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982).

[18] *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983).

[19] *Goldsmith v. New York Psychoanalytic Inst.*, 22 Empl. Prac. Dec. (CCH) ¶ 30,764 (N.Y. App. Div. 1980).

[20] *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983).

[21] *Vickers v. Veterans Administration*, 30 Empl. Prac. Dec. (CCH) ¶ 33099 (W.D. Wash. 1982).

[22] *Gladys J. v. Pearland Indep. School Dist.*, 520 F. Supp. 869 (S.D. Tex. 1981).

[23] *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402 (5th Cir. 1983).

[24] *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249 (1985).

The law does not automatically exclude any impairment which is thought to be contagious or otherwise harmful to others. In one case, in fact, the court found mentally retarded children with potentially infectious serum hepatitis were handicapped within the meaning of the Act, *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d at 644. In *Carey*, the court noted that serum hepatitis could possibly be transmitted to others. However, relying on Rehabilitation Act the court held:

> The children in this suit are clearly handicapped within the meaning of Section 706(7). They were excluded from regular public school classes and activities 'solely by reason of their handicap' since only mentally retarded youngsters who were carriers of the hepatitis B antigen were isolated; no effort was made to identify and exclude normal children who were carriers. Section 504 is thus fully applicable to this case.

Id. at 649. Although the case did not squarely hold that serum hepatitis is a handicap,[25] it clearly prohibited discriminatory conduct based on generalized fear of contagion. Under the Government's argument, even though students in *Carey* were handicapped, they would have been excluded from coverage under the Act because a general fear of their infectiousness motivated the discriminatory treatment they received.

At this time, there are no other cases which directly address the question of whether contagious impairments are handicaps. However, cases in which other impairments have been thought to be dangerous to the health or safety of others provide a useful analogy.

[25] The Second Circuit did not state explicitly, but seemed to base application of the Act on the fact that the children discriminated against were retarded.

In cases which presented the potential danger of a particular impairment, no court has ever held that any potential threat required the impairment to be excluded from the definition of a "handicap." Rather, these courts have consistently found such impairments to be handicaps within the meaning of the Act and focused on whether the person was, in spite of the handicap, "otherwise qualified" for the position in question.

Where safety concerns focus on the likelihood of reoccurrence of a medical problem, courts hold that the risk must be dealt with on an objective basis. See *Allen v. Heckler*, 780 F.2d 64 (D.C. Cir. 1985); *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402, 1411-12 (5th Cir. 1983); *Doe v. New York University*, 666 F.2d 761, 778-79 (2d Cir. 1981) based on pre-medical evidence.

In *Mantolete v. Bolger*, 767 F.2d 1416, 1421-1422 (9th Cir. 1985) the court noted the similarity between Sections 501 and 504 of the Act and proceeded to hold that in order to excude an epileptic individual from employment on the basis of possible future harm "there must be a showing of a reasonable probability of substantial harm. Such a determination cannot be made merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. The question is whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm."

In *Strathie v. Department of Transportation*, 716 F.2d 227, 230 (3d Cir. 1983), a school bus driver had been terminated because he had a hearing impairment which required him to use a hearing aid to hear adequately. A Department of Transportation rule excluded people who could not hear at a certain level without a hearing aid from obtaining bus driver positions. The Department justified the rule on safety grounds, contending that a

hearing aid could be lost, malfunction, or otherwise preclude the wearer from localizing sound on a noisy school bus. *Id.* at 232-33. The court found the plaintiff to be handicapped within the meaning of the Act. Although the court considered these safety concerns in its analysis, it ruled that such concerns did not require the impaired plaintiff be excluded from the Act's coverage.

Similarly, the safety consideration rationale was used by an employer to justify the firing of a truck driver with a medical history of epilepsy in *Costner v. United States*, 31 Empl. Prac. Dec. ¶ 33,446 (CCH) (E.D. Mo. 1982). The employer cited to a federal regulation which precluded any person with a medical history of epilepsy from driving trucks. The regulation was based on medical data that epileptics were more likely to be involved in accidents than nonepileptics, and that it was impossible to qualify epileptics for driving duties even if they had been seizure-free for any length of time. However, the potential dangers cited by the employer did not preclude the court from ruling that epilepsy is a handicap, as other courts had already held. *See also, Duran v. City of Tampa*, 451 F. Supp. 954 (M.D. Fla. 1978).

Blanket exclusion of tuberculosis and other infectious diseases from coverage of the Act is incongruous with the provisions of the Act which define as handicapped those persons who have a history of an impairment or are *thought* to have an impairment. 29 U.S.C. 706(7)(C). If the trial court's blanket exclusion of infectious diseases from the Act's protection is adopted by this Court, the outcome would be anomalous. Under such a construction, people who have been totally cured of an infectious disease, would not be covered by the Act.[26] These people

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[26] The last time Mrs. Arline was required to take a tuberculosis test was the summer of 1981. She is no longer scheduled or required to go back periodically for continuing exams (Tr. 76).

could be refused hiring, they could be fired, they could be demoted or they could be otherwise penalized with impunity because of their supposed physical condition. Actions taken as a result of beliefs regarding their disease simply would not constitute discrimination on the basis of a handicap. Such a result is surely inconsistent with Congress' language and intent. Likewise, those who never had an infectious disease but were only *thought* to have one, would not be covered by the Act. Congress did not intend these results. In passing the Rehabilitation Act, one primary goal was to protect persons who are stigmatized by their impairment.[27] Few handicaps are more stigmatizing than contagious diseases, and people who have a medical history of those diseases[28] are precisely the people who require federal protection. They are not automatically excluded from the protection of the Act.

F. An effect of a handicapping impairment cannot be segregated from the impairment itself in order to immunize discriminatory conduct from judicial review

The contention of the school board and the Government, raised for the first time on appeal to this court is best summarized by the Government's assertion:

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[27] *See Accommodating the Handicapped: Rehabilitating Section 504 after Southeastern*, 80 Colum. L. Rev., 171, 175 (1980).

[28] One testament to the stigmatizing nature of contagious diseases is the principle that a false accusation a person has such a disease has been found to be actionable as defamation under the common law. *See Atkinson v. Equitable Life Assurance Soc. of the United States*, 519 F.2d 1112, 1118 (5th Cir. 1975); *Campbell v. Jacksonville Kennel Club*, 66 So.2d 495, 497 (Fla. 1953). In *Kirby v. Smith*, 54 S.D. 608, 224 N.W. 230 (S.D. 1929), the Court held that an accusation that a clerk had tuberculosis stated a cause of action for slander, noting prophetically, "[w]e think that this would tend to injure her in respect to her profession or business. It imputes to her a general disqualification in respect to the occupation of a clerk and would certainly have a tendency to prevent her from procuring employment."

> [D]iscrimination based on contagiousness is not discrimination based on a handicap, even though persons with physical handicaps may be among those adversely affected by the discrimination.

Brief for the United States as Amicus Curiae supporting Petitioners at 12 (hereinafter cited as Gov't Brief).

The error of this position arises from an unsupported leap in logic—the segregation of a "health condition" from the handicap itself. Govt. Brief at 12. This statement appears to be contrary to the government's own previous admission that "a federal grantee or federal agency cannot avoid Section 504's nondiscrimination mandate simply by positing that its decision was based not on a handicap, but on some other ground." Gov't Brief at 11. Therefore, by its own admission, its analysis leads to an absurdity which would eviscerate the Act. If followed to its full extent, the Government's rationale would sanction discrimination against a wide range of handicapped individuals on the irrational basis of negative reaction to outward manifestations of handicapping impairments.

Counseling clients to avoid scrutiny under the Rehabilitation Act would become a simple matter under the Government's formulation. Rather than discriminating against an actual impairment, clients would merely need to articulate their reasons for imposing upon a handicapped person in terms of an outward manifestation of the handicap. Thus, while aversion to paralysis would not pass muster, discrimination based on a negative reaction to wheelchairs would.[29] Likewise, aversion for canes

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[29] "Discrimination motivated by an aversion to a cosmetic disfigurement would not, absent a perceived or actual nexus to a disabling condition, constitute handicap discrimination under Section 504. In contrast, if a federal program manager discriminated against an individual actually physically disabled—such as a person confined to a wheelchair—because of the manager had an aversion to the individual's handicap, he would clearly have violated Section 504." Gov't Brief at 15 n.12.

and dogs could with only a modest degree of indirection justify discrimination against the blind.

Moreover, the Government's position permits discrimination arising from unfounded fears. Grant recipients could refuse employment to cancer victims because of a fear, however uninformed, but nonetheless all too common, that cancer is communicable. Discrimination against polio victims presents an even better analogy to the present case. That disease, which historically has engendered reaction in the nature of public hysteria, is at early stages a communicable disease and also a most debilitating one in some cases. Franklin D. Roosevelt, a polio victim, could therefore have been denied program benefits by a federal grantee because of a fear that his polio remained contagious. While these illustrations seem simplistic, the logic in the Government's and Petitioner's position would allow the segregation of a manifestation of an impairment from the impairment itself. This would then permit the analysis of virtually any physical impairment in terms which would permit discrimination if only that discrimination is articulated as being based on a characteristic rather than the impairment itself.

The Government has administered this Act for thirteen years and now for the first time perceives a distinction between impairment and conditions of impairment. This distinction is contrary to thirteen years of regulatory interpretation.

The Government attempted to distinguish the fact that its own agency (HHS) defines a *condition* of a handicap, "cosmetic disfigurement," as an impairment by HHS. 45 C.F.R. 84.3(j). The Government's argument reached its ultimate absurdity in the following statement:

> Discrimination motivated by an aversion to a cosmetic disfigurement would not, absent a perceived or actual nexus to a disabling condition, constitute handicap discrimination under Section 504.

Gov't Brief at 5 n.12.

Viewed another way, if discriminatory animus against a handicapped person's cosmetically unappealing appearance may be prevented only if there is a "perceived or actual nexus" to the "disabling condition," the argument presented by the school board and the Government is self-defeating. A condition of a disabling disease is *ipso facto* related to the disabling condition. It is clear from the record that even if Mrs. Arline was minimally infectious or contagious, that condition had its nexus to tuberculosis. This nexus was certainly perceived by the superintendent, the anonymous parents, the staff, and the school board as justification for permanently terminating Mrs. Arline from her job of thirteen years.

In *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981), the court rejected the argument that discriminatory and conclusory reactions against a *condition* of the handicap of multiple sclerosis was not illegal discrimination. In that case a handicapped doctor was denied a psychiatric residency on the general assumption that patients, and in turn other doctors would react negatively to the fact that Dr. Pushkin was in a wheelchair. The Tenth Circuit also specifically rejected the general assumptions that the psychological and other side effects of Dr. Pushkin's drug treatment for multiple sclerosis could possibly create problems. Thus, in determining whether such discrimination was improper, the court focused on the discrimination which was directed toward a manifest condition of the handicap rather than the handicap itself.

G. Section 504 coverage of communicable diseases is consistent with the states' public health interests

The board and the Government argue that Section 504 coverage of contagious diseases interferes with the traditional federal-state balance of authority to regulate the public health, and suggest such a result was not contemplated by Congress. *See* Petitioner's Brief at 19-20; Gov't Brief at 9-10. Their contention misperceives the

actual state interest at stake, and ignores action taken by many states in this field.[30]

The Government's interest in controlling communicable diseases is unquestionably strong, but would not be well-served through the course urged by the school board and the Government. Protection of the public from contagious disease cannot even begin until carriers are identified and treated. Those afflicted with such diseases should be encouraged to seek treatment. However, the fear that seeking treatment may cost them their jobs, as in Mrs. Arline's case, is a powerful motivation for concealment. The American Public Health Association has urged this Court to recognize Section 504's coverage of communicable diseases for this reason, noting that "[r]emoving the fear of permanent job loss encourages prompt treatment. Thus, protection of the long range employment rights of tuberculosis patient *decreases* the possibility of infecting others and advances public health protection." APHA Brief at 16-17 (footnote omitted) (emphasis added).

That Congress intended Section 504 to cover people who may pose a safety risk is evident from concerns during its consideration of the 1978 Amendment relating to alcohol and drug abusers. Rejecting the House amendment which would have entirely excluded alcoholics and drug abusers from 504's coverage,[31] Senator Williams successfully argued that the safety risk posed by addiction was better addressed by *including* those persons within the Act's coverage. He stated that "[t]o add to the stigma by excluding such persons from protection under this law would only serve to encourage them to deny they have a problem rather than to admit it and seek treatment . . . ." 124 Cong. Rec. 30323-24 (1978).

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[30] *See* AMA Brief at 7-8 for a full discussion of state statutes regarding contagious diseases and public health.

[31] *See* previous discussion of Legislative history *supra* pp. 18-19, and Congressional Brief at 35-40.

It is also unreasonable to assume recognition of communicable diseases as within the Act's coverage would significantly alter the federal-state balance of public health regulation. State public health action has long been subject to federal review on constitutional grounds. *See Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967) (housing code and fire code violations struck on Fourth Amendment grounds); *Jew Ho v. Williamson*, 103 F. 10 (1900), *Wong Wai v. Williamson*, 103 F. 1 (1900) (quarantine and inoculation of twelve city blocks challenged under Fourteenth Amendment). These cases and areas of regulation were known well before the 1974, amendment of Section 504, and as stated in *Bowen v. American Hospital Ass'n*, 106 S.Ct. 2101 (1986), the Court will "presume that this [Federal-state] framework was familiar to Congress when it enacted § 504." *Id.* at 2113 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 696-7 (1979)).

The argument that Section 504 coverage would interfere with state public health regulation also ignores the independent action of numerous states which recognize communicable diseases under their own handicap discrimination laws.[32]

In short, recognition of Section 504 coverage of communicable disease keeps the Act well within "manageable bounds," *Choate*, 105 S.Ct. at 720 and in fact, within the plain language, history and objectives of the Act. The weighty federalism concern in *Bowen*, that state regulatory agencies were being forced to enlist as "foot

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[32] *See* Brief for the Employment Law Center, National Gay Rights Advocates, Bay Area Lawyers for Individual Freedom, and Lambda Legal Defense and Education Fund as Amici Curiae supporting Respondent at 18-20 (hereinafter cited as ELC Brief); Brief for the Attorney General of California, *et al.* as Amici Curiae supporting Respondent at 1 (hereinafter cited as Attorney General's Brief).

soldiers in a federal crusade" 106 S.Ct. at 2120, is simply not present here.

H. The risk of contagion, as with all perceived risks arising from an individual's handicap, must be evaluated on a case-by-case basis

The Rehabilitation Act prohibits "reflexive reactions" to handicapping impairments which are "gounded in ignorance or capitulation to public prejudice." *Arline*, 772 F.2d at 765. The superintendent's recommendation of outright termination after thirteen years of competent service exceeded the expert's medical advice, and was heavily influenced by lay public reaction. In reality, Dr. McEuen characterized her decision to recommend the temporary removal of Mrs. Arline from her third grade classroom as based upon a "possible case of tuberculosis." The "mere possession of a handicap is not a permissible ground for assuming an inability to function." *Davis*, 442 U.S. at 405. Section 504 was designed to avoid assumptions about an impaired person's abilities, and rather to require precise case-by-case evaluation based on the individual's medical history. *Bentivegna v. United States Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982); *Pushkin*, 658 F.2d at 1385.

Congress clearly intended to act against such prejudice by extending the benefits of the Act to persons ". . . *regarded* as having [a substantially limiting] impairment." 29 U.S.C. 706(7)(b)(iii) (emphasis added).

Statutorily impermissible assumptions are demonstrably inappropriate when applied to those handicapped by communicable illnesses. Contagion in general, and specifically contagiousness arising from a tubercular impairment, are not static concepts which can be generally or broadly applied. The fact that one has been infected with tuberculosis does not mean that person has developed the disease, or is contagious. AMA Brief at 4-5. Indeed, in this case the district court received undisputed evidence that the risk of contagion from contact with an individ-

ual who has tuberculosis is a matter of degree (J.A. 35-36.) Those with this impairment may become cured and never contagious (AMA Brief at 5); the possibility of being infectious may be "remote," (J.A.42) or "very minimal" (J.A.14), as was the case with Mrs. Arline when she was fired (J.A.42); or the risk may be progressively greater in degree (J.A. 7-8; AMA Brief at 5-6). Thus, as is clear from the medical evidence in this case concerning this one individual, a blanket exclusion of "possibly" infectious handicapped people exceeds medically necessary means to contain the risk.

In *Carey*, 612 F.2d at 644 previously discussed at 23, the potentially contagious school board acted on the same assumptions, and in the same *ad hoc* manner as did the school board in this case. The Second Circuit noted that "the Board is obligated to make at least some *substantial showing* in court that its plan is justified . . . ." *Id.* at 646 (emphasis added). The court then disapproved the quarantine plan because, in terms identical to those appearing in the *Arline* record, "[a]t trial, the Board was unable to demonstrate that the health hazard posed by the hepatitis B carrier children was anything more than a remote possibility." *Id.* The Second Circuit further characterized the record as lacking "any evidence that a serious possibility of transmittal existed. . . ." There the court criticized an *ad hoc* decision which imposed a disproportionate burden on the retarded children and which did not include a comprehensive, system-wide approach to hepatitis. The court's concerns in *Carey* were directed to the lack of the grant recipient's factual, medical basis for what amounted to capricious overreaction to a perceived danger. These concerns apply equally to the facts in this case.

The board failed to make at least some substantial showing that its permanent termination of Mrs. Arline was justified. On the medical record before both the board and the court, there was nothing more than a remote possibility that Mrs. Arline was infectious and a

risk to anyone. As in *Carey*, the board's action was an overreaction to an uninformed fear of danger.

II. MRS. ARLINE IS OTHERWISE QUALIFIED, DESPITE HER HANDICAP, TO PARTICIPATE IN THE SCHOOL BOARD'S PROGRAM

A. The Court does not need to reach the "otherwise qualified issue." Extending Mrs. Arline the same program benefits available to the non-handicapped would have allowed her continued employment

On the limited record before this Court it is clear that Mrs. Arline could have obtained meaningful relief simply by being afforded all of the benefits of the school board program which were available to nonhandicapped employees. As the trial judge specifically found, "the school board has a local policy which does permit working out of field or out of certification. . . ." while teachers attempt to obtain certification in other fields (Tr. 109). This program benefit was not extended to Mrs. Arline, and the denial of this benefit was based solely on her handicap.

The doctor testified that teaching older students who did not remain in a confined space with Mrs. Arline for long periods of time would have minimized any public health risk to an "acceptable" level.[33] The relief Mrs.

[33] Q. Would you have any hesitation at all—would you have had any—we're talking about back; then I realize you don't know what the status is today—but would you have had any hesitation to recommend that she teach high school students?

A. At that time I think that would have been acceptable, yes, sir.

Q. Now, when you say acceptable, what do you mean by that? That the risk—

A. I mean that there is always a risk, but the risk is considerably lessened in older people who are not spending all day long in the same room with the same teacher. That's what—

(J.A. 15-16)

Arline sought at trial was merely the nondiscriminatory application of benefits of job flexibility already available to non-handicapped employees. Thus, her qualifications to serve the school board system as a whole were not limited to the requirement of serving third grade pupils. Without the need for affirmative accommodation, Mrs. Arline is, on this record and as a matter of law,[34] entitled to the relief she seeks.

B. The determination of whether a handicapped person is "otherwise qualified" is fact-specific and does not allow the *per se* exclusion of those handicapped by a contagious disease

On the one hand, the school board presents Dr. McEuen's medical testimony that Mrs. Arline was contagious as justification for their decision to remove Mrs. Arline from the classroom. However, in actuality it totally disregarded that same expert's advice concerning possible accommodations under which any risk would be medically acceptable. It was Dr. McEuen's opinion that Mrs. Arline was safely employable within the school system even though she had tested positive in the past. The school board obviously accepted Dr. McEuen as an authoritative expert in their decision-making process. The school board should not be allowed to rely selectively on only those portions of an expert's advice which will support their actions, while rejecting other aspects of that same expert's advice which suggested a qualified and limited approach to the accommodation of Mrs. Arline's medical problem.

The issue of whether Mrs. Arline was "otherwise qualified" to remain a tenured teacher within the Nassau County school system was a mixed question of fact and law to be determined by the court. *Arline*, 772 F.2d at 764-765. Under this analysis, each case must be considered on an individual basis and upon its own unique facts. *Carey*, 612 F.2d at 649. *See also* AMA brief at

[34] *See infra* pp. 37-40.

18-19. This is precisely what the school board failed to do in this case. The school board had absolutely no justification to impose a blanket exclusion upon Mrs. Arline on the basis of her handicap. Mrs. Arline does not argue that she should have been allowed to teach third grade students while her handicap was in an infectious stage. She argues, however, that the school board could not justify permanent termination without first pursuing medically authorized accommodations. Over the short term, reasonable accommodation could have been accomplished simply by placing Mrs. Arline on a leave of absence until her tuberculosis was cured. Over the long term, periodic testing could have been used to assure Mrs. Arline did not have a recurrence of infectiousness.[35]

Under 45 C.F.R. 84.3(k), a qualified handicapped person is one who, with reasonable accommodation, can perform the essential functions of the job in question.

Whether a handicapped individual is otherwise qualified to participate in a federally funded program is ultimately a fact question concerning the reasonableness of accommodations which are available to afford meaningful participation to the handicapped. "Mere possession of a handicap is not a permissible ground for assuming inability to function in a particular context." *Davis*, 442 U.S. at 405. Decisions must be based on facts, not assumptions, and ultimately the determination turns on a fact-specific issue—the reasonableness of modifications which will accommodate the handicapped:

> However, the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under the Section would seem to be two sides of a single coin; *the ultimate question is the extent to which a grantee is required to make reasonable modifications* in its program for the needs of the handicapped.

Choate, 105 S.Ct. at 820 n.19 (emphasis added).

[35] "Three reactivations of the disease of tuberculosis . . . are extremely rare in properly treated cases." AMA Brief at 8-9.

In Mrs. Arline's case, as Judge Vance noted, the trial court did not engage in the fact-specific analysis of determining "whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice." *Arline*, 772 F.2d at 764-765. On the record before this Court, it is clear that the school board bowed reflexively to public prejudice and uninformed fears about a disease which has widely varying degrees of contagiousness and which is capable of being quickly controlled. *See* p. 6 *supra*. The Act, and the case law which has construed the Act,[36] forbid blanket exclusions because a person's handicap may pose a risk to others.

As previously discussed, Congress followed this analysis in 1978 in refusing to amend the Act by adopting a *per se* exclusion of alcoholics and drug abusers.[32] The record demonstrates that merely extending to Mrs. Arline program benefits available to non-handicapped employees would, permit her to continue her career on a medically "acceptable" basis.

C. Legal standards require accommodation in this case

The risk of endangering others posed by a handicap is a legitimate consideration permitted by the Act, a self-evident proposition Mrs. Arline has never questioned. The Act's regulatory framework and interpretive case law guide the determination of the extent to which risk disqualifies a handicapped person from a Section 504 program. These principles were not applied to this case.

The standard for determining whether a handicapped person is "otherwise qualified" blends two of the Act's

[36] *Strathie*, 716 F.2d at 227; *Pushkin*, 658 F.2d at 1372; *Costner*, 31 Empl. Prac. Dec. 29,027 (E.D. Mo. 1982).

[37] *See supra* pp. 18-19.

provisions and requires a detailed factual analysis of the needs and limits of a grantee's program for its resolution. "Safety risk" cases such as this also require additional analysis of the actual nature of the risk at issue and the extent to which it can be reasonably accommodated.

This Court recognized in *Choate* that an "otherwise qualified" determination can be made *only* by factoring in the employer's obligation to reasonably accommodate the handicapped. *Choate*, 105 S.Ct. at 820 n.19. *Accord*, *Treadwell v. Alexander*, 707 F.2d 473, 477 (11th Cir. 1983) (a plaintiff who could perform the essentials of the job if provided reasonable accommodation would be entitled to relief). The accommodation overlay is an important modification of this Court's *Davis* requirement that to be "otherwise qualified," a person must meet all the program requirements "in spite of the handicap." The principle to be applied is that a program participant is "otherwise qualified" if he or she can meet the program's requirement in spite of a handicap, if provided reasonable accommodation.

The Fifth Circuit has noted that once a plaintiff meets the burden of demonstrating that she is qualified to perform the essential functions of the job, "the burden of proving inability to accommodate is on the employer." *Prewitt v. United States Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981). *See also Mantolete*, 767 F.2d at 1423. The board made absolutely no showing that it is unable to accommodate Mrs. Arline's handicap.

The extent of the accommodation duty is fleshed out in the Act's regulations and decisions of the Court. *See* 45 C.F.R. 84.12. In *Choate*, this Court noted the criticism of its "affirmative action" language in *Davis* and stated the grantee's obligation to accommodate: the accommodation must be reasonable, and is unreasonable *only* if it would result in a "fundamental alteration in

the nature of the program." *Choate*, 105 S.Ct. at 720; *Davis*, 442 U.S. at 413-14.[38]

The "program" at issue in this case encompasses the operation of the entire school system. The Eleventh Circuit ruled, in a finding not before this Court, that the federal financial assistance which brought the board under the Act's coverage consisted of impact funds. *Arline*, 772 F.2d at 762. Because the record conclusively demonstrates that those funds were placed in general revenue and distributed proportionately throughout the entire system (J.A.70,76), this Court is not faced with a case in which the federal financial assistance only reaches one part of an overall school system operation. *See e.g., Grove City College v. Bell*, 104 S.Ct. 1211 (1984). The nondiscrimination and accommodation duties of the board are thus applicable to all operations of the school system, and it is the entire system which must be analyzed in determining what accommodation would be reasonable. *See* 45 C.F.R. 84.12(c) (size, type, and nature of operation all relevant to recipients duty to accommodate). No factual findings on these issues were made by the district court below.

The definition of Mrs. Arline's "job" within the grantee's program is equally broad. Since the duty to accommodate depends in large part on what the job to be accommodated is, *see* 45 C.F.R. Section 84.12(b), the definition of her job assignment was critical. Mrs. Arline was working under a tenured contract at the time of her dismissal which defined her employment as a "teacher." She was not a third grade teacher (although that is the

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[38] Far from suggesting that the school board fundamentally alter its program to accommodate Mrs. Arline, respondent suggests that it merely apply the benefit of teaching outside of certification in a non-discriminatory manner. Moreover, on remand the trial court could consider use of leaves of absence, such as those initially received by Mrs. Arline, which are clearly available under the program and therefore would not be an alteration of the program.

position she held), and her assignment under the terms of her contract was not limited to elementary school. (J.A.55) She was employed as a teacher by the board which presumably retains the flexibility on its side to reassign teachers to different grades as exigencies may dictate. In determining whether Mrs. Arline is otherwise qualified given accommodation, it is, at least, a teaching position anywhere within the entire school system which is relevant, not just elementary teaching.

D. Reasonable accommodations were available for use by the school board which would have allowed Mrs. Arline to continue in productive employment

If the Court wishes to entertain the question of whether reasonable accommodations were available to render Mrs. Arline "otherwise qualified," again the unrefuted record demonstrates a number of possible avenues. The only expert opinion available to the trial court and the school board demonstrated several medically acceptable approaches.

Dr. McEuen testified that there are sputum tests which were and are available to help determine contagion on an immediate basis (J.A.40-41); APHA Brief at 13-14. The classic diagnosis of tuberculosis is done by culture growth tests (J.A.23-24). A culture can grow in two weeks, but it would not be considered a negative culture for eight weeks (J.A.24). However, another method available to test if a person is infectious which gives immediate results is a microscopic sputum smear (J.A. 40-41). If the germs (the acid-fast bacilli) were visible, the person would be considered more infectious then if there were no organisms visible on the smear. The number of organisms which occurs after a culture growth is another method of determining infectiousness (J.A.41).[39]

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[39] Dr. McEuen's testimony before the school board was more complete than at trial. She advised the board that Mrs. Arline's cultures had very few bacilli present. *See generally* note 8, *supra*.

Dr. McEuen's testimony suggests that in the case of tuberculosis, contagion is the product of an interrelated probability analysis.[40] The extent of contagiousness of the tuberculosis carrier is a matter of degree,[41] and can be determined by sputum and culture testing. The degree of an individual's contagiousness can be established and monitored medically both on an immediate and long term basis. Once a sufferer tests negatively, as Mrs. Arline did subsequent to her termination, that person is no longer contagious.

Second, Dr. McEuen testified that the probability of contracting tuberculosis varies with the age of students. Younger students, although at a very minimal risk level, are relatively more susceptable than older students.

Third, contagiousness is proportionate with length of confinement in a closed environment with a carrier (J.A. 16; AMA brief at 6).

Fourth, one of the most obvious methods by which the school board could have accommodated Mrs. Arline was by placing her on a leave of absence[42] until treatment rendered her condition no longer contagious.

This analysis is parallel to that of *Mantolete*, 767 F.2d at 1422, where the Ninth Circuit noted that an employer "must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of po-

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[40] For a mathematical model adopting cross-probability computations as a legal analytical tool, *see Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977), *citing* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. R. 338 (1966).

[41] As Dr. McEuen testified: "The chances of getting tuberculosis would depend on three—the infectiousness of the case, the length of contact and the susceptibility of the individual" (J.A. 37-38).

[42] Leaves of absence were evidently available within the program, as Mrs. Arline herself received two over the three year course of time relevant to this case. On remand, the availability and costs of leave (including unpaid leaves) could be developed more fully.

tential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job."

Thus, the record itself conclusively and without refutation demonstrates that Mrs. Arline could have been reasonably accommodated by the school board. It could have allowed her the benefit accorded non-handicap persons of teaching outside of certification. The school board should have, at the very least, considered allowing Mrs. Arline to teach older students or adult education students in an environment which called for hourly rotation in and out of class, while requiring her to undergo sputum tests which would have assessed any contagiousness contemporaneously.[43] With accommodations such as these, any risks would have been, according to the expert testimony of Dr. McEuen, much less and, perhaps, acceptable. The school board is not entitled to ignore medical or technological knowledge, as it did, in refusing to accommodate. *See Davis*, 442 U.S. at 412-413.

Had the fact-specific issues of accommodation and of whether Mrs. Arline was "otherwise qualified" to continue her 13 years of contribution to the school board's program been considered by the finder of fact, other means of accommodation could have been explored.[44]

E. Agency regulations endorse accommodations in the nature of those available to the school board

The federal agencies responsible for interpreting Section 504 have consistently required programs or activities receiving federal financial assistance to make reasonable

[43] The record suggests that such testing is at Public Health Department expense and hence would not be a financial burden to the school board.

[44] In this regard it is significant to note that government regulations mandate " 'adaptation of the manner in which specific courses are conducted' " for purposes of accommodating handicapped students. *Choate*, 105 S.Ct. at 721 n.21 citing 45 CFR 84.44(a) (1983). The mirror image of such accommodations should be explored for the benefit of a handicapped teacher.

accommodation for the handicapped. *See* 45 C.F.R. 84.12. The Department of Health, Education and Welfare[45] guidelines governing recipients of federal financial assistance, provide for:

> Reasonable accommodation.
>
> (A) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.
>
> (B) *Reasonable accommodation may include*: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) *job restructuring*, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.
>
> (C) In determining pursuant to paragraph (A) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include: (1) the overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) the type of the recipient's operation, including the composition and structure of the recipient's work force; and (3) the nature and cost of the accommodation needed.
>
> (D) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant, if the basis for the denial is a need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

45 C.F.R. Pt. 84.12. (emphasis added)

[45] The Department of Education, now responsible for disbursements of Title I and impact aid funds, has a current regulation identical to the one issued by HEW. *See* 34 C.F.R. 104.12.

In Mrs. Arline's case, the board admitted that it made no attempt at accommodation nor did it even investigate any such possibility.[46]

F. The school board failed to carry its burden of proving the unavailability of reasonable accommodations

Under the Rehabilitation Act, the burden is on the employer to show the applicant or employee could not safely and efficiently perform the essentials of the job even if reasonable accommodations were made, *Prewitt*, 662 F.2d at 310; *Treadwell*, 707 F.2d at 475, and to show its inability to accommodate the applicant or employee. *Prewitt* at 310. *See also Nelson v. Thornburgh*, 567 F.Supp. 369 (E.D. Pa. 1983), aff'd, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 955 (1985); *see supra* p. 15.

It is not sufficient for an employer merely to cite a possibility of danger to the health or safety of others to be relieved of its responsibilities under the Act. In *Carey*, 612 F.2d 644, the Second Circuit refused to uphold the school board's decision to exclude mentally retarded children from classes when they were found to be carriers of serum hepatitis. The court acknowledged the school board's actions in that case "involved the very essence" of the state's power to protect the health, safety and welfare of its citizens, *id.* at 648, but refused to give conclusive deference to the board's decision. The court found the school board was unable to demonstrate anything more than a "remote possibility" the children posed a health hazard. *Id.* at 650.[47] The presence of Mrs.

---

[46] Q. At any time did you investigate the possibility of allowing Mrs. Arline to work in some other capacity within the school system?

A. No, sir, I did not. (J.A. 53)

Moreover, the record reflects no analysis of leaves of absence available under the collective bargaining agreement.

[47] The court in *Carey*, as have other courts cited *supra*, shifted the burden to the agency of justifying its policy after a *prima facie* case of discrimination was established.

Arline in the classroom, as similar to the mentally retarded children in *Carey*, only posed a very minimal risk to the third grade children and an acceptable risk for her to teach older students from a public health perspective.

Similarly, in *Costner*, the Court rejected a blanket exclusion of people with a history of epilepsy from driving trucks, even though there was substantial medical evidence to supporting the applicable regulation. The court noted that the individual had been seizure-free for twenty-one years, had not had a driving accident for fifteen years, and a doctor had testified that the individual was at no significant risk of seizure.

In *Strathie* the Third Circuit rejected a number of safety concerns proffered by the Transportation Department to justify its regulation forbidding hearing-impaired persons from driving school buses. The court stated that the nature of the program was to prevent "any and all *appreciable* risks." *Strathie*, 716 F.2d at 232 (emphasis supplied).

In this case, the school board did not meet its burden of establishing there was an appreciable danger in permitting Mrs. Arline to work under some other reasonable accommodation. This fact is irrefutable because the Petitioner admitted it did not even consider any accommodation at all (J.A.53-54). The State Tuberculosis Control Center Assistant Director made it clear the risk of infection was very minimal and that there were numerous jobs Mrs. Arline could perform safely, such as teaching older children, adults, or working in a "nonstructural setting" (J.A.15,18-19). The doctor testified there was no reason to disqualify Mrs. Arline from any other job (J.A.21), and that the risk of continuing her career in some other position would have been acceptable (J.A.22). Mrs. Arline herself suggested several potential methods by which the school board could reasonably and safely accommodate her illness, and at trial establish the

existence of board policy permitting teachers to work out of certification (J.A.54-55; Tr.109). The board admitted there were positions open with the board which included teaching older children and adults, or working in non-structured settings (J.A.59,61).[48]

The superintendent admitted non-medical reasons played a role in his decision to fire Mrs. Arline (J.A.63, 81-82). He rejected the doctor's expert analysis of the risk involved, and justified the decision to terminate Mrs. Arline on his own unscientific and unsubstantiated analysis that he would not permit Mrs. Arline to work where there was "a danger" (J.A.62). He freely admitted that he did not make the first effort to investigate if it was possible to find Mrs. Arline a job where she could work without being an unacceptable risk to other individuals (J.A.53).

The board's decision to terminate Mrs. Arline because of her handicap is precisely the type of behavior Congress intended to prohibit with the passage of the Rehabilitation Act of 1973. Under the Act, employers are expressly prohibited from acting on their own prejudices and misconceptions about diseases in making employment decisions. Nor are they permitted to take action based on the unfounded fears of coworkers and the public.

The arbitrariness of the board's actions in this case is highlighted by the inconsistency in its treatment of Mrs. Arline. She suffered mild relapses of tuberculosis in 1977 and 1978, and both times after successful treatment was permitted to return to work (J.A.48-50). Apparently the board concluded it was safe to reinstate Mrs. Arline after the first two relapses. There was absolutely no credible reason to support the board to treat her differently

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[48] The board did not address why it did not consider simply granting Ms. Arline an extended leave of absence, paid or unpaid, until the tuberculosis was cured, instead of permanently terminating her.

because of a third relapse. The doctor testified that it could not be concluded that Mrs. Arline would have any more relapses and, in fact, suggested she would not (J.A. 31). Furthermore, the doctor testified that the last time Mrs. Arline was tested in May of 1981, the test was negative. The doctor had no record of any more positive tests to date (J.A.20), and stated that the present infectiousness of her disease is "remote" (J.A.42). The board has not met its burden of showing Mrs. Arline could not have been safely accommodated. The evidence is that it made no such effort, even though safe alternatives were available. As one commentator cogently stated:

> Handicap discrimination is fostered, not by the invidious motives that resulted in discrimination against blacks, females and immigrants, but by myths that advanced medical knowledge has only recently begun to dispel, by ignorance as to the effects of a disability, by misconceptions as to the work capacity and needs of the afflicted individual, and by benign or compassionate attitudes.

Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 U. Balt. L. Rev. 183, 277 (1978).

This court should not permit Mrs. Arline's thirteen years of competent teaching experience to be washed away, and for her to be stigmatized and shunned because of her employer's unjustifiable reliance on medically undocumented assumptions. At the very least, the school board was required to consider and follow an objective process which was based upon rational, competent evidence and reasoning under the Act, before depriving Mrs. Arline of her livelihood.

CONCLUSION

The Eleventh Circuit's holding that Mrs. Arline is a handicapped person entitled to Section 504 protection against discrimination is due to be affirmed. The language of the statute itself, as well as its legislative history, the regulatory framework and case law compel this result. Likewise, on a limited record which discloses no effort by the Petitioner school board to accommodate Mrs. Arline's handicap, the Eleventh Circuit correctly remanded for further proceedings concerning this fact-specific issue.

Respectfully submitted,

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Case No. 85-1277

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE SCHOOL BOARD OF NASSAU COUNTY, FLORIDA; and CRAIG MARSH,
Individually and as Superintendent of Schools of Nassau County, Florida,

Petitioners,

---*vs.*---

GENE H. ARLINE,
Respondent.

PETITIONERS REPLY BRIEF ON THE MERITS

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Section 504 of the Rehabilitation Act of 1973 ..... 4, 8, 9, 10, 11, 12, 13, 14, 16, 18

Pursuant to Rule 34.4, Supreme Court Rules, Petitioners reply to the Brief of Respondent.

STATEMENT OF THE CASE

It appears from the recitations in her *Statement of the Case* that Respondent and Petitioners differ as to the facts in the Record. Petitioners, therefore, strongly suggest that certain statements contained in Respondent's Brief, on pages two through ten, need to be addressed and carefully re-examined.

In her *Statement of the Case* at the beginning of the Brief, Respondent states that the "School Board fired her after learning she had tested positively for tuberculosis in 1977 and 1978". (See page 3 of Respondent's Brief) This is, of course, not true. She was terminated by the School Board on the recommendation of the Superintendent, after being suspended with pay. She was dismissed after the School Board held a hearing and heard the expert testimony of Dr. McEuen that she presented an unacceptable risk in teaching young childen. (TT 81, 82) During the time between the suspension and dismissal she was receiving her full salary. (TT 82, line 6)

In her *Statement of the Case* (page 3) Respondent states that sometime after 1957 she was "cured". However, in her sworn testimony at trial (TT 76, line 21), the following questions and answers appear:

> Q. Now, you are presently, am I correct, forty-one years old, Mrs. Arline?
>
> A. Yes.

Q. How old were you when this condition was first diagnosed, tuberculosis?

A. I guess around fourteen.

Q. All right. And up until 1979, from age fourteen up until 1979 when -- I guess you would have been thirty-eight or so or thereabouts. Were you treated regularly for this disease?

A. Yes.

Q. Were you hospitalized?

A. In Tallahassee.

Q. Was that at the Sunland Center in Tallahassee?

A. Yes.

As to Mrs. Arline being "cured", it appears by her own testimony that she was treated regularly for twenty-four years since the disease was diagnosed. Further, as we now know from the medical evidence, tuberculosis, once contracted, is never cured but may be in a state of remission or control. The term "cured", therefore, is not appropriate for any person diagnosed as having contracted the disease. (See Petitioner's Brief, page 16)

An additional statement by Respondent in her Brief simply cannot pass without comment by Petitioners. At page 3, she states:

> "Although it was a policy of the school board to assign teachers to classes outside of their field of certification, this alternative was not extended to Mrs. Arline because of her handicap. She was terminated outright (J.A. 56-57)."

This statement would have the Court believe that a

teacher holding a bachelor's degree in elementary education and certified as an elementary school teacher should simply be transferred to teach high school physics, French or American History, without any further certification or training. The statement is not borne out by the Record and defies common sense and sound education practices. The testimony of the Superintendent did not establish that the School Board allowed every certified teacher to teach in any possible open position. (J.A. 55-57) The Superintendent's testimony was that it was the state policy to place certified teachers in their appropriate field. The School Board did, through local option, allow persons without appropriate certification to go into a particular position or grade level depending on the particular circumstance and, if that person were working towards certification in that field. (J.A. 57) The testimony of Respondent clearly demonstrates she was not making nor had she made any effort towards certification in any area other than elementary education. (TT 70-72) Her lack of effort to expand her certification existed both before and after her termination as can be seen by her lack of effort between the time of her termination (1979) and the time of her trial testimony (1983).[1]

Although perhaps not significant to the final determination of this controversy, Petitioners also note the emphasis placed by Respondent on the Board's not offering to her teaching positions that became open between the

[1] A review of the state laws on teacher certification reveals that no state specificially allows a teacher with an elementary certificate to teach at the upper secondary levels without the appropriate endorsement or an approved minor in the subject matter to be taught. *Requirements for Certification,* The University of Chicago Press, 1984-85, Burks, Mary P.

dismissal hearing (May, 1979) and the trial in the District Court (November, 1983). (See Respondent's Brief, page 3) The Respondent was terminated and her contract of employment was lawfully cancelled in May, 1979. The dismissal was upheld by appropriate judicial review in the Florida courts. There was simply no obligation, Petitioners suggest, to extend Respondent additional positions after her dismissal.

ARGUMENT

POINT I

THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS DOES NOT CONSTITUTE A "HANDICAP" WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U. S. C. 794

A. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE STATUTE

The argument of Respondent does not address one of the key issues in this appeal. The issue which appears not to be argued is whether Respondent, under Section 504 and the regulations adopted to implement it, is "impaired and substantially limited" in one or more of her "major life activities". As has been set forth in earlier Briefs, 45 C.F.L. 84.3(j) provides that

> " 'Major life activities' means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

Respondent addresses this issue by stating as follows:

> "Dr. McEuen testified that the disease can limit a major life function, that it affects the respiratory system in general, and that it includes such symptoms as coughing, chest pain, weight loss, fever and night sweats (J.A. 6-7). The school board did not dispute this testimony."

Actually, what Dr. McEuen said was as follows:

> "Q. And is it the kind of an illness which has the potential to limit a major life function such as breathing or walking or something such as that?
>
> A. It could, yes." (J.A. 7)

The question, then, recurs as to whether or not her condition affected a "major life activity". Dr. McEuen stated that often there are no symptoms of tuberculosis so that an infected person could have the disease in a contagious form and have minimal or no symptoms whatsoever. (J.A. 6) This question is simply not answered by Respondent and the Briefs of *amici* have answered this inquiry with strained reasoning.[2]

Mrs. Arline taught elementary school for thirteen (13) years. There is no indication that she could not conduct her classes, personally supervise the spelling, mathematics and penmanship lessons of her students, fill out grade

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[2] See, for instance, the Brief of the *State of California*, as *amicus curiae*, at pages 13 and 14 where the following appears:

> "This purported exception ignores the plain language of the definition of 'handicapped individual.' A person who is in fact able to transmit a serious disease to others in some manner is 'substantially limited' through the inability *to circulate freely among other people.*" (emphasis added)

books and otherwise do all of the tasks required of an elementary school teacher. Respondent's Brief, therefore, does not address the threshold of whether the disease of tuberculosis in the form suffered by Respondent is a "handicap" as defined by the Act and its regulations.

B. THE COURT OF APPEALS' DECISION IS CONTRARY TO EXPRESSIONS OF LEGISLATIVE INTENT

All parties agree that neither the language of the Act, the Congressional hearings nor the regulations make mention of tuberculosis or other contagious diseases. Much has been made of the exclusion of drug addicts and alcoholics by Respondent and various *amici.* (See page 19, Respondent's Brief) Petitioners' suggest, however, that it is not relevant nor does it assist the Court in resolving the difficulty created by Congress in enacting legislation which omits, intentionally or unintentionally, any reference to contagious diseases. Petitioners have noted that the H.H.S. analysis accompanying the regulations state that the term "physical or mental impairment" includes "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness and...drug addiction and alcoholism." 45 C.F.R. Pt. 84, App. A at 297 (1983). None of the above are contagious diseases.

In her brief, Respondent places great emphasis on the

case of *New York State Ass'n for Retarded Children v. Carey, 612 F.2d at 644.* In that case, however, the Court was concerned with the absence of any medical evidence to sustain the school board's position. This is not the factual setting in this case, however, since Petitioners only acted after and upon the direct advice of a physician specializing in tuberculosis.

The plain fact remains that Respondent had a long-standing history of tuberculosis and had three outbreaks of contagiousness within eighteen months prior to her discharge as testified to by independent medical experts and verified by medical records.[3] Petitioners' conduct was not "discriminatory" under the Act.

C. THE SCHOOL BOARD DISMISSED RESPONDENT BASED ON HER CONTAGIOUSNESS AND NOT "SOLELY BY REASON OF * * * HANDICAP," WITHIN THE MEANING OF SECTION 504 OF THE FEDERAL REHABILITATION ACT

1. Joined by the Solicitor General, we argued in our opening brief that Respondent's claim that the school

[3] An excellent statement of the facts leading up to the dismissal is set forth in the case of *School Board of Nassau County, Florida v. Gene H. Arline,* Fla. App., 408 So.2d 706. At page 707 of that decision, the court stated:

> "Appellee was hired by the School Board in 1966. In 1969 she obtained a continuing contract and currently teaches in an elementary school housing kindergarten through third grade. She had a history of tuberculosis beginning in 1957. She was given chemotherapy treatment from 1957 to 1960. No positive tuberculosis cultures were found during the eleven years thereafter. However, in 1977 she again had a positive tuberculosis culture and has continuously received chemotherapy treatment. Despite appellee's cooperation in a vigorous anti-tuberculosis program since 1977, she had positive tuberculosis cultures both in 1978 and 1979."

board violated Section 504 of the Rehabilitation Act should be dismissed because the school board did not relieve Respondent of her teaching "solely by reason of * * * handicap," within the meaning of that Act (29 U.S.C. 794). See Pet. Br. 14-28; U.S. Br. 10-23. The school board dismissed Respondent *solely* because of the public health risks posed by her contagiousness and not because of any actual handicap she may (or be perceived to) have now or to have had in the past.

Respondent and *amici* ignore the thrust of our and the Solicitor General's argument. The thrust of their arguments, unfortunately, seek to impede rather than aid the Court's consideration of what all acknowledge is a difficult question of statutory construction. To facilitate the Court's consideration of this case, therefore, we must first state what is our position and, perhaps even more important, what it is not.[4]

First, we of course agree that any individual who suffers (or is perceived to suffer) from physical or mental impairments that substantially limit the individual's major life activities is "handicapped," within the meaning of Section 504, including when the disease causing the impairment is itself contagious. Hence, contrary to the claims of Respondent and certain *amici,* no one in this case is denying that an individual who has infectious, contagious tuberculosis may be handicapped due to the actual (or perceived) physical effects of that disease now or in the past. See, *e.g.* U.S. Br. 12 ("An individual who is disabled with an infectious, contagious disease surely may be a

[4]This portion of the Petitioners' brief reflects consultation with the Solicitor General.

'handicapped individual' within the meaning of the Rehabilitation Act.") The merits of this case turn, however, not on that issue, but on a more subtle inquiry into the meaning of Section 504's prohibition on discrimination "solely by reason of * * * handicap," particularly the extent to which that prohibition restricts discrimination based on contagiousness. As discussed in our opening brief and below, it is our view that Section 504's prohibition has very limited application to discrimination based on contagiousness because contagiousness alone is not physically or mentally disabling and, accordingly, is not a handicap.

Second, we do not maintain (nor do we read the Solicitor General as suggesting) that discrimination on the basis of contagiousness can *never* constitute handicap discriminination within the meaning of Section 504. Discrimination on the basis of contagiousness plainly constitutes handicap discrimination when it is either a mere pretext for handicap discrimination or is rooted in a stereotypical judgment about the handicapped. Thus, Respondent and *amici* are flatly wrong in their repeated claims that our position reads out of Section 504's mandate the essential protection the Rehabilitation Act provides against discrimination based on pretext and false stereotypes.[5] We assert only that under the circumstances

[5]See, *e.g.*, Resp. Br. 27 ("would sanction discrimination against a wide range of handicapped individuals on the irrational basis of negative reaction to outward manifestations of handicapping impairments"); Amici Senator Cranston, et al., Br. 16 ("according to their reasoning, a handicapped person who was perfectly qualified for a job would be stripped of all Section 504 protection as long as the employer asserted a reason other than the physical or mental inability of the person to participate in a given program -- contagion, aversion, fear of increased medical or insurance expenses, superstition, or any other inaccurate but honestly held belief."); Amici Employment Law Center, et al., Br. 8 ("would allow discrimination based upon irrational stereotypes about handicapped persons because such stereotypes may concern matters other than the physical or mental effects of a particular handicap"); Amici American Public Health Ass'n, et al., Br. 27 ("Petitioners and the Department of Justice now seek * * * to block the applicability of Section 504 to certain conditions by declaring one element of some diseases, the possibility of communicability, to be a seperate characteristic for which discrimination is never unlawful.").

of this case the school board's dismissal of Respondent did not violate Section 504 of the Rehabilitation Act because her dismissal was neither a mere pretext for handicap discrimination nor based on a stereotypical judgment about the handicapped.

For this same reason, contrary to the "parade of horribles" suggested by *amici* such as the American Public Health Ass'n (Br. 31-35), our reading of Section 504 would not sanction irrational discrimination by federal grantees against persons with contagious diseases. Section 504 restricts such discrimination when it is a mere pretext for handicap discrimination or based on a stereotypical judgment about the handicapped. Even more broadly, as stressed by the Solicitor General (U.S. Br. 11 n.7):

> [A]lthough Section 504 may not forbid certain nonhandicap-based discrimination by recipients of federal financial assistance, such conduct may violate *other* federal or state laws more directly concerned with the particular program or activity at issue.[6]

Section 504 is designed to address one type of discrimination problem and should not be rewritten by the courts to deal with a distinctly different set of social concerns (see U.S. Br. 9-10). To be sure, Congress may choose to address the problem and may, as Respondent and *amici* propose, ultimately choose to impose the Section 504 nondiscrimination model on the type of circumstances presented by this case. The decision, however, is for Congress, and not the courts, to make in the first instance.[7]

[6]Indeed, *amici* supporting respondent make just this point in suggesting that many state nondiscrimination laws might restrict determinations based on contagiousness. See *e.g.*, Amici Employment Law Center, et al., Br. 14-18; Amici California, et al., Br. 26-27.

[7]As recent events testify, the balance will not necessarily be an easy one for Congress to strike. See Sacks, Brenner, Breeden, Anders & Parker, *Epidemiology of a Tuberculosis Outbreak in a South Carolina Junior High School*, 75 American J. Pub. Health 361 (1985) (describing spread of tuberculosis in junior high school).

2. Respondent and her supporting *amici* nonetheless urge on this Court two different extreme readings of Section 504, neither of which is tenable.

a. Under the first, advanced by Respondent and some of the *amici* (most notably the American Medical Association (AMA), discrimination on the basis of contagiousness would *always* constitute handicap discrimination whenever the individual being discriminated against is (or is perceived to be) physically or mentally disabled by the contagious disease. Respondent and the AMA base their claim on the proposition that contagiousness is an inseparable part of an individual's handicap.[8]

This contention is fundamentally flawed, however, because contagiousness may exist wholly apart from any physical or mental disability and therefore contagiousness can not accurately be described as an inseparable part of a handicap.[9] As the American Medical Association readily acknowledges (Br. 5),[10] an individual may be contagious

[8]See *e.g.*, Resp. Br. 27 ("The error of [the government's and petitioners'] position arises from * * * the segregation of a 'health condition' from the handicap itself."); Amici AMA, et al., Br. 24 ("[I]f a disease like tuberculosis substantially limits a person's major life activities, then tuberculosis is the impairment or handicap, including, but not limited to, the effects of that disease. In those circumstances, a federal fund recipient could not, therefore, discriminate against an individual 'solely on the basis of' the disease of tuberculosis 'including the effects of the disease on the victim and on third parties)"); Amici Senator Cranston, et al., Br. 12 (contagiousnss "is an inherent characteristic of the handicap"); Amicus Epilepsy Foundation of America Br. 5 ("It is not possible to separate the effects of a disease from the disease itself."); Amici APHA, et al., Br. 29 (contagiousness is an "intrinsic element" of the disease.)

[9]See generally Mandell, Douglas & Bennett, *Principles and Practice of Infectious Diseases*, 110-111, 120-125 (1979).

[10]At trial, Dr. McEuen similarly testified that there are often no symptoms of tuberculosis, so that an infected person could have the disease in a contagious form and have minimal or no symptoms whatsoever (J.A. 6).

in respect to a serious, and sometimes disabling disease, such as tuberculosis, without being physically disabled by tuberculosis (or, conversely, an individual can be physically disabled by tuberculosis and not contagious). For this reason, as the AMA further appears to acknowledge (Br. 24-25 n.20),[11] discrimination on the basis of contagiousness is plainly not discrimination on the basis of a handicap, when the individual being discriminated against is not now and has not in the past been handicapped or perceived to be so.

Given that premise, we see no reason to suppose that discrimination on the basis of contagiousness is necessarily handicap discrimination just because the individual is also handicapped. Instead, like discrimination based on other human characteristics that may be possessed by both the handicapped and the non-handicapped alike, discrimination on the basis of contagiousness should constitute handicap discrimination only if one of two circumstances is established: (1) the non-handicap characteristic allegedly relied on -- in this case contagiousness -- is in reality a pretext designed to conceal the true motivation, which was handicap-based; or (2) the determination that the individual is contagious is rooted not in fact but in a

[11] The AMA concludes that "[a] person who has no symptoms of a communicable disease but nonetheless carries it may not be handicapped within the statutory definition because being a pure carrier may not, depending on medical evaluations and legal judgments, significantly limit the carrier's major life activities" (AMA Br. 24-25 n.20). The AMA also argues that whether Respondent is handicapped in this case depends on the "nature, degree and duration of the impairment caused by the disease and then on a legal judgment whether that impairment is 'substantial'" (id. at 16). The AMA nowhere suggests that the contagiousness is itself a handicap, but instead suggests the possibility that "Respondent's respiratory functions may have been seriously affected" (id. at 17 n.11). Presumably, under the AMA's view, if it were established on remand that Respondent was not handicapped (or perceived to be handicapped), Respondent's Section 504 claim based on dismissal for contagiousness would fail.

stereotypical conclusion derived from a handicap. Neither Respondent nor any of its suppo-ting *amici* nor the AMA which advance the "inseparability" theory come to grips with this problem.

b. The remaining *amici* supporting Respondent advance a different and even more extreme view of Section 504. They argue that contagiousness is itself a handicap and, consequently, discrimination on the basis of contagiousness is *always* handicap discrimination. In support of their contention that contagiousness is a handicap in its own right, the *amici* argue that contagiousness limits an individual's ability to engage in the major life activity of interacting with others.[12] Under this view, of course, even an immune carrier who did not suffer (and was not perceived as suffering) from any physical or mental disabilities from the disease could be the subject of handicap discrimination. Such a boundless view of "handicap" would lead to absurd results. It is no doubt for this reason that the AMA appears to have specifically rejected it (see AMA Br. 24-25 n.20; see note 7, *supra*). As explained by the Solicitor General:

> [T]he fact that a contagious individual may be sharply restricted in his interactions with others, who are reluctant to deal with him, [does not] render contagiousness a handicap under Section 504. Section 504 is not intended to redress the full variety of human characteristics that may result in sharply restricted lives or in discriminatory treatment. It is only discrimination based on an actual or perceived handicap, and not all types of discrimination triggered by unfavorable societal attitudes toward a human characteristic, that is entitled to protection under the Rehabilitation. Otherwise, a host of personal characteristics that others might find offensive or even threatening -- ranging from personal hygiene

[12] See, *e.g.*, Amici Doctors for AIDS Research, et al., Br. 45 (asymptomatic carriers are handicapped because "[b]oth procreation and sexual intercourse are substantially limited for such individuals").

> or appearance to a propensity for criminal or violent conduct -- would constitute handicaps. Section 504 would, in effect, ban discrimination based on any attitude that restrains the opportunities of each person to live a productive life. Whatever the merits of such a regime, it was plainly not enacted by Section 504.

U.S. Br. 20-21 (citation omitted); see also id. at 21 and nn. 18, 19.

c. In sum, the attack launched by Respondent, and others supporting *amici* against our view of Section 504, which is shared (we believe) by the Solicitor General, substitutes passion for careful and candid analysis, attacks a position not advanced by Petitioner, and virtually ignores the central issue presented by this case, which we discuss further below.

3. The dispositive inquiry in this case is whether the school board's dismissal of Respondent based on the board's concern about her contagiousness amounted to a stereotypical judgment about a handicap.[13] We believe that the record is clear that it was not such a handicap-based judgment and, accordingly, Respondent's Section 504 claim should be dismissed.

In this case, we submit, the school board's decision was based solely upon the state public health official's report to the school board that Respondent had tested positive with respect to contagiousness and was an "unacceptable risk." Issues concerning respondent's physical

[13]The "stereotype" inquiry is the critical inquiry in this case because, as discussed above, contagiousness is not itself a handicap and the other possible ground for a Section 504 claim -- that the school board's concern with contagiousness was a mere pretext for handicap discrimination -- is not seriously advanced here. See U.S. Br. 21-22.

or mental abilities, including the relationship of her contagiousness to any handicap she might be suffering, played absolutely no role in the school board's determination.[14]

a. At the outset, the school board's decision clearly was not handicap-based because Respondent was neither handicapped nor perceived to be handicapped and, therefore, there was no handicap upon which the board could have based a stereotypical judgment about contagiousness. In other words, Respondent was the equivalent of the contagious, nonhandicapped immune carrier who, as even the AMA appears to acknowledge (Br. 24-25 n.20; see note 7 *supra),* cannot complain of handicap discrimination because any discrimination against the carrier based on his contagiousness necessarily lacks the statutorily-required nexus to a "physical" or "mental" "impairment".

b. In any event, even if Respondent were handicapped within the meaning of Section 504 (perhaps on the ground that she had a past history of being disabled by tuberculosis), the result is the same because the record leaves no doubt that Respondent was in all respects treated without regard to any physical handicap and, hence, like the AMA's "immune carrier." In making this submission, we fully appreciate that the judicial inquiry into whether a federal grantee's concern about contagiousness is handicap-based in a particular case should be exacting. While contagiousness may, like other human characteristics, be shared by both the handicapped and the

[14]Notably, there is no accusation that Respondent was singled out by the school board because of her "past record of tuberculosis, as found by the Eleventh Circuit.

nonhandicapped, it is not, unlike other such human characteristics, wholly unrelated to the handicap itself in those instances when the contagious individual is also handicapped by that same contagious disease (see U.S. Br. 19 & n.11). For this reason, there is legitimate cause for concern that a decision ostensibly based on contagiousness may in reality be just a stereotyped conclusion derived from the handicap itself. Accordingly, where the underlying illness does amount to a handicap, courts should carefully inquire to determine if the concern about contagiousness has a factual basis and is not simply an unsupported conclusion derived from the handicap itself.

POINT II

ONE WHO IS AFFLICTED WITH THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS IS PRECLUDED FROM BEING "OTHERWISE QUALIFIED" FOR THE JOB OF ELEMENTARY SCHOOL TEACHER, WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. 794

Respondent, at page 39 of her Brief, discusses the Board's duty to accomodate her, suggesting that the "program" at issue is the entire school system and that the Board should somehow find a job for her anywhere in the school system, in order to comply with the "reasonable accommodation" requirement of the Act. As previously set forth in this Reply Brief, the argument of Respondent (page 39-45, Respondent's Brief) presumes that a teacher certified to teach elementary education must be accommodated by furnishing that teacher a different position

in a different level simply because the teacher holds the generic professional title of "teacher". Certification laws and sound educational practices simply cannot be ignored upon facts such as these.

Further, there is no indication that even older students are not susceptible to becoming infected with tuberculosis. In fact, there appears to be some difference of opinion as to the issue of greater susceptibility even among the medical experts. The Respondent cannot be accommodated without endangering the health of others. Where, as here, medical experts may disagree as to the degrees of suscept-ibility, a school board must act to protect those endangered without the additional responsibility of distinguishing between those more or less susceptible students. This onerous task should not realistically be given to a lay school board especially in light of the divergence of opinion among medical experts regarding the susceptibility at different students or different stages of their early life.[15]

It is undisputed, however, that all persons are susceptible to tuberculosis infection upon contact with one carrying the disease. (J.A. 4-11)

CONCLUSION

There is insufficient evidence that a person suffering

[15] Dr. McEuen testified that young children were more susceptible than adolescents. However, other medical authorities disagree. The following appears at page 6 of the Brief of the American Medical Association, as *amicus curiae:*

> "The risk of infection developing into the disease is highest in children under three years of age, lowest in later childhood, and *high again* in adolescents and young adults." (emphasis added) Comstock, Livesay & Woolpert, *The Prognosis of a Positive Tuberculin Reaction in Childhood and Adolescence*, 99 Am. J. Epidemiology 134 (1974).

from tuberculosis in the form suffered by Respondent is "impaired" in their major life activities. Further, there is no evidence in the Act that contagious diseases were specifically intended to be covered and included by Congress. The omission of this segment of medical infirmities by Congress simply should not be construed as a silent indication of coverage in the absence of clear, legislative mandate.

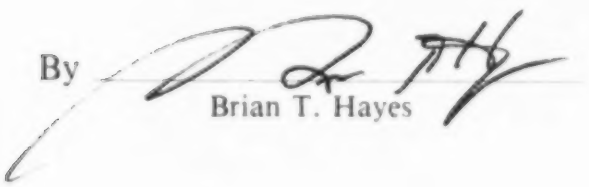
Notwithstanding the argument of Respondent, a program for reasonable accommodation of an elementary schoo! teacher is simply not feasible unless it could be determined that her disease no longer exists in communicable form. If the disease no longer exists she is not "handicapped". School administrators cannot be expected to administer a medical clinic or to supervise weekly, daily or monthly testing of their employees. Assignment to a different position (science teacher, Latin teacher, school principal) involves an entirely different job with different duties but does not remove the risk of contagion unless accompanied by constant medical monitoring.

Respondent, by her own choosing, elected to limit her certification to elementary education. A reasonable requirement for elementary school teachers is that they, simply stated, be free of communicable disease. Respondent, therefore, is not "otherwise qualified" for the position of elementary school teacher as that term has been defined and implemented under and since the case of *Southeastern Community College v. Davis,* 442 U.S. 397 (1979) and the record amply supports such a conclusion.

Respectfully Submitted

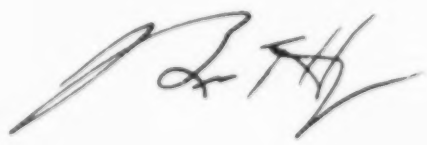
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I HEREBY CERTIFY that a true copy of the Petitioners Reply Brief was furnished by U. S. mail to George K. Radhert, Esquire, 233 Third Street North, St. Petersburg, Florida 33701, Attorney for the Respondent this 25th day of November, 1986.



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No. 85-1277

In the Supreme Court of the United States

OCTOBER TERM, 1986

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, ET AL.,
PETITIONERS

v.

GENE H. ARLINE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which forbids discrimination in federally-assisted programs against an otherwise qualified handicapped individual "solely by reason of his handicap," makes unlawful discrimination based on concern about contagiousness.

2. Whether a person who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504.

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GENE H. ARLINE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the scope of the nondiscrimination mandate of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits discrimination on the basis of physical and mental handicaps in federally-assisted programs and activities. The United States has substantial responsibilities for enforcing Section 504. Pursuant to executive order, the Secretary of Health, Education, and Welfare promulgated regulations "establish[ing] standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." Exec. Order No. 11,914, 41 Fed. Reg. 17871 (1976); see generally 45 C.F.R. Pt. 84.[1] In addition, the United States has substantial

[1] In 1980, the Secretary's responsibility was transferred to the Attorney General (Exec. Order No. 12,250, 45 Fed. Reg. 72995), and the regulations were "deemed to have been issued by the Attorney General." *Id.* at 72997; see 28 C.F.R. Pt. 41. The regulations require

compliance obligations under Section 501 of the Rehabilitation Act, 29 U.S.C. (& Supp. II) 791, not to engage in impermissible handicap discrimination. See generally 29 C.F.R. Pt. 1613. The outcome of this case will directly affect the enforcement responsibilities and compliance obligations of numerous federal agencies and recipients of federal funds. For this reason, the United States has participated as amicus curiae in other cases before this Court involving Section 504. See *Alexander* v. *Choate*, No. 83-727 (Jan. 9, 1985); *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984); *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981); *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979).

STATEMENT

1. Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *" (29 U.S.C. 794). The Rehabilitation Act defines "handicapped individual" for purposes of Section 504 as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment" (29 U.S.C. 706(7)(B)).[2] Accordingly, the Act's nondiscrimination

each federal agency to issue its own regulations concerning handicap discrimination in the programs and activities financially assisted by the agency. 28 C.F.R. 41.4.

[2] The definition of "handicapped individual" also provides that the term does not include a person who is an alcohol or drug abuser whose current use prevents him from performing the relevant job duties or poses a direct threat to the property or safety of others. 29 U.S.C. 706(7)(B).

mandate protects not only those who are presently handicapped, but also those who suffer discriminatory treatment because they are believed to have a handicap whether that belief rests on a history of past handicap or is a misperception with no basis at all.

2. Respondent Arline worked as an elementary school teacher for 13 years until April 1979 when the school board dismissed her because she had infectious, contagious tuberculosis (Pet. App. 2).[3] Arline first contracted tuberculosis at the age of 14 in 1956 after which the disease went into remission, until she suffered one relapse in 1977 and two additional relapses in 1978 (*ibid.*). The school board's action was based on the report of a state health official who, upon learning that she was suffering from infectious, contagious tuberculosis, recommended to the school board that she not be permitted to continue to teach a class of third-grade students full-time (J.A. 13, 48-51, 61-64, 80-81).

3. Arline brought suit in federal district court against the school board alleging, inter alia,[4] that the school board had impermissibly discriminated against her based on her handicap in violation of Section 504 of the Rehabilitation Act (Pet. App. 3). At trial, the state health official (upon whose report the school board had relied) testified that she had based her recommendation to the school board on the heightened susceptibility of young children to infectious, contagious tuberculosis, which can be transmitted by "[e]xhaling or respiration, coughing, sneezing, [and] breathing" (J.A. 13, 23). The official also testified that older persons would be less susceptible to the contagion (*id.* at 15). The school superintendent testified that he had

[3] References to the appendices to the petition for a writ of certiorari, which were not paginated, are based on our consecutive numbering of the pages.

[4] Respondent's due process claim under 42 U.S.C. 1983, which both courts below rejected, is not before the Court.

not considered the possibility of offering Arline alternative employment in the school system (*e g.*, as a teacher of older children or an administrative non-teaching position) because of the continuing risk Arline posed to the entire student population and to other school employees (*id.* at 53-55).

Following a non-jury trial, the district court ruled that Arline was not a "handicapped person" within the meaning of Section 504 (Pet. App. 14). The court reasoned that although Arline was unquestionably suffering from infectious tuberculosis, such an infectious disease did not fall within the statutory definition of handicap under the Act (*ibid.*). The court ruled, in the alternative, that even if infectious tuberculosis did constitute a handicap, the school board had satisfied its obligations under Section 504 (Pet. App. 14-15). According to the court, Arline was qualified only to teach elementary school and the school board was under no obligation to place her in employment elsewhere in the school system (*id.* at 15).

4. The court of appeals reversed and remanded on the ground that Arline was a "handicapped individual" within the scope of Section 504 (Pet. App. 7-9).[5] The court noted that tuberculosis "can significantly impair respiratory functions as well as other major body systems" and that even if Arline was not currently disabled by tuberculosis, the nondiscrimination mandate of Section 504 extends to individuals, such as Arline, who either had a "record of such impairment" or were "regarded as having such an impairment" (Pet. App 8). The court found no expressions of congressional intent, either in the language of the statute or its legislative history, to exclude contagious diseases from the scope of Section 504, and therefore held that

[5] The court of appeals also reversed the district court's ruling that Section 504 did not apply to petitioner because the school system was not a federally-assisted program or activity within the Rehabilitation Act. This Court denied the petition for a writ of certiorari on that issue.

contagious diseases were within the Act's scope (Pet. App. 8-9). The court, accordingly, remanded the case for further proceedings to make factual findings relevant to whether the school board could reasonably accommodate Arline by transferring her to a different position in the school system (*id.* at 10-11).

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act makes unlawful discrimination "solely by reason of * * * handicap" against "otherwise qualified handicapped individual[s]" in federally-assisted programs and activities (29 U.S.C. 794). Respondent argues, and the court of appeals held, that Section 504's nondiscrimination mandate extends to discrimination based on concern about contagiousness. In particular, respondent contends that petitioners, a county school board and school superintendent, violated Section 504 by dismissing respondent from her position as an elementary school teacher because she had contagious, infectious tuberculosis. We disagree.

1. Discrimination on the basis of contagiousness is not handicap discrimination within the meaning of Section 504. Section 504 bars discrimination against otherwise qualified handicapped individuals only when that discrimination is "solely by reason of * * * handicap" (29 U.S.C. 794). Section 504 does not purport to bar all discrimination, regardless of its basis, that might adversely affect handicapped individuals. Contagiousness is not itself a handicap, however, and consequently discrimination based on concern about contagiousness is not itself handicap discrimination. A handicap, within the meaning of Section 504, is a condition that is either actually physically or mentally disabling or mistakenly perceived to be physically or mentally disabling, measured in terms of the individual's physical or mental ability to accomplish certain daily tasks. An individual may be contagious in

respect to a serious, and sometimes disabling disease, however, without being physically or mentally disabled in any manner or being regarded by others as being physically or mentally disabled.

In the absence of any suggestion to the contrary in the statutory language or legislative history of the Rehabilitation Act, we cannot suppose, moreover, that Congress intended to equate "contagiousness" with "handicap." If "contagiousness" were a "handicap" the result would be to inject federal nondiscrimination principles into an area of public health law—federal and state regulation of communicable diseases—involving public policy issues of a wholly different nature than those considered by Congress in enacting Section 504. The myriad federal and state laws and programs that address the sensitive public health issues posed by communicable diseases would become subject to Section 504's nondiscrimination mandate. Nothing in the Rehabilitation Act's language or legislative history, however, suggests that Congress intended such a far-reaching result.

Nor is there any suggestion in the record that respondents' dismissal of Arline was a mere pretext for handicap discrimination. The record in this case clearly establishes that the school board's sole motivation was to protect persons in the school system, particularly highly susceptible young students, from the health risks posed by Arline's contagiousness. In addition, the school board's determination that Arline was contagious was plainly not rooted in a false stereotypical judgment about any handicap, as handicap is defined in Section 504. The school board's determination neither carried implications at all regarding nor derived in any way from the disabling effects of her disease.

2. Even if discrimination based on contagiousness constitutes handicap discrimination under the Rehabilitation Act, Arline's complaint should be dismissed because she was not, as required by Section 504 (see 29 U.S.C. 794),

"otherwise qualified" to retain her elementary school teaching position. The record clearly demonstrates, and the district court found, that the contagious nature of her tuberculosis rendered her unqualified to continue to teach early grades of elementary school. The reasonable accommodation obligation of Section 504 does not, moreover, require the school board to provide Arline with a different job in the school system where she might pose less of a health risk to others (*e.g.*, as a teacher of older students or a non-teaching school administrator). In the employment context, the employer's accommodation obligations pertain only to the qualifications of a handicapped individual for a particular job. Section 504 does not require an employer to hire a handicapped person because he may be unqualified for *other* jobs or, conversely, hire him for a different job because he is unqualified for his current position. Providing Arline with a job elsewhere in the school system, either as a teacher of older students or a non-teaching administrator, would be tantamount to hiring her in a different capacity and, hence, is not required by Section 504.

ARGUMENT

THE SCHOOL BOARD DID NOT VIOLATE SECTION 504 OF THE REHABILITATION ACT BY DISMISSING AN ELEMENTARY SCHOOL TEACHER AFFLICTED WITH CONTAGIOUS, INFECTIOUS TUBERCULOSIS BECAUSE DISCRIMINATION ON THE BASIS OF HER CONTAGIOUSNESS DID NOT CONSTITUTE HANDICAP DISCRIMINATION AND BECAUSE, IN ANY EVENT, THE TEACHER WAS NOT "OTHERWISE QUALIFIED" TO RETAIN HER POSITION

This case concerns the question whether the nondiscrimination mandate of Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on the contagious nature of a potentially disabling illness. The general purpose of the Rehabilitation Act was to

"develop[] the opportunities for all individuals with handicaps to live full and independent lives." *Community Television* v. *Gottfried,* 459 U.S. 498, 508 (1983); *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 626 (1984). To that end, Section 504, adopting language virtually identical to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*,[6] makes unlawful discrimination "solely by reason of * * * handicap" against "otherwise qualified handicapped individual[s]" in federally-assisted programs and activities (29 U.S.C. 794).

"Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Alexander* v. *Choate*, No. 83-727 (Jan. 9, 1985), slip op. 7 (footnote omitted). Congress concluded that both widespread societal ignorance of, and indifference to the needs of the physically and mentally handicapped as well as stereotypical judgments (including benign, but paternalistic judgments) about their abilities had resulted in a denial of equal opportunities to handicapped individuals. S. Rep. 93-1297, 93d Cong., 2d Sess. 50 (1974); 118 Cong. Rec. 525 (1972) (remarks of Sen. Humphrey); 117 Cong. Rec. 45974 (1971) (remarks of Rep. Vanik); see also 124 Cong. Rec. 30327 (1978) (remarks of Sen. Dole). Congress enacted Section 504 to require consideration by federal grantees of both the actual needs and abilities of handicapped individuals to the extent necessary to "assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance" (*Alexander* v. *Choate*, slip op. 16). In furtherance of this objective, Congress amended the law in 1974 to extend the Act's nondiscrimination mandate to include not only those

[6] Title VI proscribes discrimination on the basis of race, color, or national origin in federally-assisted programs. 42 U.S.C. 2000d.

persons actually suffering from a handicap, but also those persons discriminated against based on the mistaken belief that they are handicapped (29 U.S.C. 706(7)(B)).

In interpreting Section 504, this Court has "respon[ded] to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds" (*Alexander* v. *Choate*, slip op. 11; *United States Department of Transportation* v. *Paralyzed Veterans*, No. 85-289 (June 27, 1986), slip op. 13). In particular, the Court has rejected invitations to extend Section 504 to programs that are not themselves recipients of federal financial assistance, but "are 'inextricably intertwined' with an institution that [is]" (*Paralyzed Veterans*, slip op. 13), to interpret Section 504 "to reach all action[s] disparately affecting the handicapped" and thus to seek to guarantee the handicapped "equal results" with the nonhandicapped (*Choate*, slip op. 10-11, 16), or to hold that Section 504 requires employers to disregard physical or mental limitations caused by a handicap in determining whether a handicapped individual is "otherwise qualified" for participation in the particular federal program or activity at issue (*Southeastern Community College* v. *Davis*, 442 U.S. at 405-407).

In this case, respondent proposes and the court of appeals held that discrimination on the basis of contagiousness constitutes discrimination on the basis of a handicap in violation of Section 504. We submit that such a construction of Section 504 would, like those rejected in the earlier cases, extend the Rehabilitation Act's nondiscrimination mandate beyond what Congress contemplated and, in effect, impose a legislative scheme for dealing with a class of serious and difficult problems which Congress has not addressed. In particular, respondent's construction of Section 504 would inject its nondiscrimination principles into an area of public health

law—federal and state regulation of communicable diseases—involving public policy issues of a wholly different nature than those considered by Congress in enacting Section 504. Federal and state governmental actions taken in response to the public health risks posed by communicable disease would, as in this case, be subject to charges of handicap discrimination. These charges of discrimination would, in turn, have to be resolved without the benefit of any congressional guidance as to how to balance the competing societal concerns at stake.

In this and every other case in which a contagious person brings a Section 504 action, a federal funding agency or a federal court would have to determine whether the contagious individual was "otherwise qualified" for the activity from which he was excluded. Federal agencies would have to make medical judgments about the risk of contagion in particular settings and balance the risk of the spread of disabling diseases against the interest of the contagious individual. To keep the nondiscrimination mandate of Section 504 "within manageable bounds," and to avoid erosion of Section 504's central mission under the pressure of a class of cases it was not meant to solve, this Court should reverse the judgment of the court of appeals.

A. The School Board Did Not Violate Section 504 Because It Did Not Discriminate Against Arline On The Basis Of A Handicap

1. Section 504, like the nondiscrimination mandates in other civil rights laws, makes unlawful discrimination *based on* certain criteria. See *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979) (footnote omitted) (Section 504 "indicat[es] only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context"); *Alexander* v. *Choate*, No. 83-727 (Jan. 9, 1985), slip op. 9; S. Rep. 93-1297, 93d Cong., 2d Sess. 39 (1974) (Section 504 "constitutes the establishment of a broad government policy that programs receiving Federal financial assistance

shall be operated without discrimination *on the basis of handicap*") (emphasis added). Section 504 does not bar all discrimination adversely affecting a handicapped person, but only discrimination "solely by reason of his handicap" (29 U.S.C. 706(7)(B)). For example, discrimination based on above or below average stature, even when its victims include blind or hearing-impaired individuals who are unquestionably "handicapped," is not discrimination "solely by reason of * * * handicap" barred by Section 504.[7]

Of course, a federal grantee or federal agency cannot avoid Section 504's nondiscrimination mandate simply by positing that its decision was based not on a handicap, but on some other ground. When the posited ground for discrimination is a mere pretext for handicap discrimination, Section 504 bars the discriminatory treatment. Cf. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981) ("the plaintiff must * * * have an opportunity to prove * * * that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination") (citation omitted). In addition, if the federal grantee's sole reason for assuming that an individual possesses the characteristic justifying discriminatory treatment is that the individual is handicapped, Section 504 would similarly be violated. For example, although a federal grantee may exclude applicants to a federal program on a genuine but mistaken belief that they are incompetent, if the grantee bases its determination of incompetence *on the fact* that the applicant is

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[7] We must stress that although Section 504 may not forbid certain nonhandicap-based discrimination by recipients of federal financial assistance, such conduct may violate other federal or state laws more directly concerned with the particular program or activity at issue. Hence, just as Section 504 does not make unlawful all irrational or unjustified actions taken by federal recipients, neither does 504 condone such conduct.

handicapped, he violates Section 504. Forbidding such false handicap-based stereotypical judgments is a primary purpose of Section 504.

2. The school board's threshold defense to this action is not, contrary to the court of appeals' apparent assumption (Pet. App. 7-9), that contagious diseases cannot constitute "handicaps" within the meaning of Section 504, no matter how physically disabling they might be. An individual who is disabled with an infectious, contagious disease surely may be a "handicapped individual" within the meaning of the Rehabilitation Act. Instead, the school board claims that discrimination based on contagiousness is not itself discrimination based on a handicap, even though persons with physical handicaps may be among those adversely affected by the discrimination. We agree. Because Section 504 makes unlawful only discrimination against handicapped individuals *based on their actual or perceived handicaps,* Arline can maintain an action under Section 504 only if one of two circumstances is present: (1) the basis of the school board's action—contagiousness—is itself a handicap under the Act, or (2) the school board's determination that Arline is contagious is a mere pretext for handicap discrimination or is based on a false, stereotypical judgment solely relating to an actual or perceived handicap.[8] Our reading of the record in this

[8] The record in this case does not clearly establish that the disabling effects of Arline's relapses of tuberculosis would be sufficient to make her a "handicapped individual" within the meaning of Section 504. Because we conclude, however, that the school board's dismissal of Arline was not based on such disabling effects, we may assume, without reaching the fact-bound issue, that the disabling effects of Arline's tuberculosis are, have been classified to be, or have been perceived by others to be sufficiently severe to make her a "handicapped individual" under the Act. See 29 U.S.C. 706(7)(B). That the extent of any physical disability actually suffered by Arline is wholly irrelevant to the Section 504 inquiry in this case underscores the inappropriateness of characterizing her contagiousness as a handicap.

case, in light of the statutory language, relevant legislative history, and implementing federal regulations, compels the conclusion that Arline's claim must fail as a matter of law.[9]

3. The Rehabilitation Act does not define "handicap" per se, but through its definition of "handicapped individual"[10] makes plain that only conditions that either are in fact or are perceived to be physically or mentally *disabling* constitute "handicaps" for the purposes of the federal rehabilitation law.[11] A condition is disabling if it impairs an individual's physical and mental ability to accomplish certain daily tasks. Contagiousness is, therefore, not itself a "handicap" within the meaning of the Rehabilitation Act. An individual may be contagious in respect to a serious and sometimes disabling disease without himself being physically or mentally disabled in any manner and without being regarded by others as being physically or mentally disabled in any manner.

[9] The Department of Justice Office of Legal Counsel recently issued an opinion concerning the applicability of Section 504 to discrimination in federal programs against individuals who suffer from (or are regarded as suffering from) Acquired Immune Deficiency Syndrome (AIDS) and related conditions. It is our understanding that petitioners have lodged a copy of the Office of Legal Counsel opinion with the Court.

[10] See 45 C.F.R. 84.3(*l*) (" 'Handicap' means any condition or characteristic that renders a person a handicapped person.").

[11] Our reading of the Rehabilitation Act's definition of "handicapped individual" comports with the ordinary meaning of the term "handicap," both expressed in *Webster's Third New International Dictionary* 1027 (1981) (defining "handicap" as "a disadvantage that makes achievement unusually difficult; *esp.*: a physical disability that limits the capacity to work"), and reflected in this Court's decisions. See, *e.g., Southeastern Community College* v. *Davis,* 442 U.S. at 413 ("a refusal to accommodate the needs of a *disabled* person amounts to discrimination") (emphasis added).

When Congress first enacted the Rehabilitation Act in 1973, the Act provided one definition of "handicapped individual" for the entire Act, including Section 504. The 1973 Act defined handicapped individual as "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to * * * this Act." Pub. L. No. 93-112, § 7(6), 87 Stat. 361. The congressional objective in the 1973 enactment was to provide persons suffering from a "physical or mental disability" both vocational rehabilitation and training (see S. Rep. 93-318, 93d Cong., 1st Sess. 8-10, 21 (1973); see also H.R. Rep. 93-244, 93d Cong., 1st Sess. 9 (1973)) and protection from discrimination in federal programs (see, *e.g.*, 118 Cong. Rec. 525 (1972) (remarks of Sen. Humphrey); 117 Cong. Rec. 45974 (1971) (remarks of Rep. Vanik)). There is no indication in the legislative history of the 1973 enactment that congressional concern with handicapping conditions extended to conditions, such as contagiousness, which leave an individual physically and mentally unimpaired, but cause him to pose a risk to others.

Congress amended the definition of "handicapped individual" in 1974, for the purposes of Section 504, to mean "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment" (29 U.S.C. 706(7)(B)). As described in the accompanying Senate Report, the amendment reflects Congress's conclusion that the 1973 definition too "narrowly limited" the scope of Section 504 by tying the concept of handicap to employability. S. Rep. 93-1297, 93d Cong., 2d Sess. 37-38 (1974). The new definition, accordingly, defines handicap more broadly to include disabling conditions that limit

"major life activities" (*i.e.*, caring for one's self, * * * walking, seeing, hearing, speaking, breathing, learning, and working" (45 C.F.R. 84.3(j)(2)(ii)). In addition, the new definition reflects the congressional determination that handicap discrimination can occur in circumstances when the individual is mistakenly believed to be handicapped. S. Rep. 93-1297, *supra*, at 38.

The 1974 amendment, without explanation, also used the word "impairment" for the first time, substituting for "disability" the phrase "impairment which substantially limits one or more of such person's major life activities" (29 U.S.C. 706(7)(B)). The plain meaning of this language and the legislative backdrop of this amendment dispel any suggestion that Congress intended this new terminology to include a health condition, like contagiousness, which is not itself disabling. The new language, like the predecessor term "disability," does not readily extend to the concept of contagiousness.[12] An individual who is contagious is not

[12] The ordinary meaning of "impair" is "to make worse: diminish in quantity, value, excellence, or strength: do harm to." *Webster's Third New International Dictionary* 1131 (1981). The remainder of the statutory language makes clear that it is impairment of one's ability to engage in major life activities that is at issue. See 45 C.F.R. 84.3(j)(2)(i) (defining "[p]hysical or mental impairment" as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the * * * body systems" or "any mental or psychological disorder"); 45 C.F.R. 84.3 (j) (2)(ii) (defining "major life activities" as "caring for one's self, * * * walking, seeing, hearing, speaking, breathing, learning, and working"). Cosmetic disfigurement may be an anomalous element in the illustrative list supplied in the HHS regulation, except as the disfigurement is regarded, rightly or wrongly, as implying an impairment in the strict sense. Discrimination motivated by an aversion to a cosmetic disfigurement would not, absent a perceived or actual nexus to a disabling condition, constitute handicap discrimination under Section 504. In contrast, if a federal program manager discriminated against an individual actually physically disabled—such as a person confined to a wheelchair—because the manager had an aversion to the individual's handicap, he would clearly have violated Section 504. See 117 Cong. Rec. 45974 (1971) (remarks of Rep. Vanik).

necessarily physically or mentally "impaired" in ability to perform major life activities any more than he is physically or mentally "disabled."[13] Both impairment and disability—particularly as the terms are utilized in the Rehabilitation Act—imply an inability to perform certain physical or mental functions.[14]

Even more fundamentally, to read "impairment" to include contagiousness would expand the scope of the Rehabilitation Act into entirely new areas of public health law, and do so in the absence of any suggestion that Congress intended such a result. If contagiousness is an "impairment" that "substantially limits major life activities," then the myriad federal and state laws and programs that address the sensitive public health issues posed by com-

[13] The Social Security Act, 42 U.S.C. 423 (d)(1) (A) defines the term "disability" as meaning the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment * * *."

[14] As a general matter, the terms "impairment," "disability," and "handicap" tend to be used interchangeably and their true meaning in any particular context is revealed by the presence of other modifying words and the purposes of the particular statute in which the terms are used. See generally, R. Burgdorf, Jr., *The Legal Rights of the Handicapped Persons: Cases, Materials, and Text* 14 (1980). In the Rehabilitation Act, the statutory requirement that to constitute a "handicap" a "physical or mental impairment" must limit a major life activity implies that the impairment must adversely affect an individual's ability to perform a physical or mental task. See *de la Torres* v. *Bolger,* 610 F. Supp. 593, 596 (N.D. Tex. 1985) (left handedness is not an impairment because "impairment cannot be divorced from its dictionary and common sense connotation of a diminution in quality, value, excellence or strength"), aff'd, 781 F.2d 1134, 1138 (5th Cir. 1986); see also *Jasany* v. *United States Postal Service,* 755 F.2d 1244, 1248-1250 (6th Cir. 1985) (crossed-eyes not an impairment that substantially affects a major life activity); *Tudyman* v. *United Airlines,* 608 F. Supp. 739 (C.D. Cal. 1984) (muscular build is not a handicapping condition).

municable diseases become subject to Section 504's nondiscrimination mandate. Traditional state programs would become subject to Section 504, as would state and federal programs designed to prevent the spread of certain diseases by limiting the activities of infected persons.[15]

Had Congress intended Section 504 to apply to discrimination based on the risk of contagion, we would expect some indication of that purpose in the statute or its legislative history. Cf. *Alexander* v. *Choate,* slip op. 11. There is nothing, however, in the statutory language or legislative history of the Rehabilitation Act that even

[15] From 1796 to the present, Congress has enacted laws authorizing the executive branch to take action to curb the spread of communicable diseases, including quarantines, scientific research, and assisting and cooperating with state legislative efforts. See 42 U.S.C. 243, 264 and 42 U.S.C. (& Supp. II) 247b; Act of Feb. 25, 1799, ch. 12, 1 Stat. 619 *et seq.* (an Act respecting Quarantines and Health Laws); Act of May 27, 1796, ch. 31, 1 Stat. 474 *et seq.* (an Act relative to Quarantine); see generally, Morgenstern, *The Role of the Federal Government in Protecting Citizens from Communicable Diseases,* 47 U. Cin. L. Rev. 537 (1978); see also Walz, *Federal Regulation of Quarantine,* 4 Mich. L. Rev. 189 (1905). Similarly, state legislatures and their predecessors have long been concerned with the regulation of communicable diseases and today typically have enacted laws pursuant to their broad police powers providing for reporting of the occurrence of certain communicable diseases, closing of public places, quarantines, and the denial of marriage licenses based on the presence of certain diseases, and compulsory immunization to prevent their spread. See, *e.g.,* Ariz. Rev. Stat. Ann. §§ 36.621-36.623 (1986) (reporting requirement); Conn. Gen. Stat. Ann. §§ 19a-207, 19a-221 (West 1986) (quarantines); Fla. Stat. Ann. §§741.051-741.053 (West Supp. 1986) (marriage licenses); Idaho Code §§ 39-4801—39-4802 (1985) (compulsory immunization); 1798-1821 R.I. Pub. Laws 38 (quarantine of persons afflicted with smallpox); Vt. Rev. Stat. ch. 36 (1797) (same); Act of Quarantine, ch. II, 1722 Va. Acts 99 (Hening) (quarantine of incoming ships from areas infected with plague); see also Morgenstern, *supra,* 47 U. Cin. L. Rev. at 545 n.62 ("By September 1976, 47 of the 50 states required at least one type of immunization prior to school entry.").

remotely suggests that Congress contemplated the possibility that Section 504 would apply to federal and state efforts to control the risks presented by contagiousness, including the type of action taken by the school board in this case. Indeed, federal legislative enactments strongly suggest that Congress has approached separately the two public policy issues—assisting the handicapped and preventing the spread of contagion—presumably because the latter raises a host of public health questions not implicated by the former.

In *Bowen* v. *American Hospital Ass'n,* No. 84-1529 (June 9, 1986), this Court declined to extend Section 504 so as " 'to make major inroads [in a matter implicating the states'] longstanding discretion' " in the absence of a clear indication of congressional intent (slip op. 30 (quoting *Alexander* v. *Choate,* slip op. 19)). Yet this would be precisely the effect of extending Section 504 to decisions based on the fact that an individual has a communicable disease. In the absence of any indication of congressional intent to the contrary, we believe "Congress * * * '[should] not be deemed to have significantly changed the federal-state balance' " (*Bowen* v. *American Hospital Ass'n,* slip op. 32, quoting *United States* v. *Bass,* 404 U.S. 336, 349 (1971)). This conclusion is particularly compelling in a case such as this one where the federal obligations apply to states only upon acceptance of federal funds and, therefore, it is necessary "that Congress speak with a clear voice, [so as to] enable the [s]tates to exercise their choice knowingly, cognizant of the consequences of their participation" (*Pennhurst State School* v. *Halderman,* 451 U.S. 1, 17 (1981)).

Hence, while the 1974 amendment increased the scope of the concept of "handicap" to include both actual and perceived disabling conditions, and in the process substituted new terminology, the core of the concept remained, for the purposes of federal law, a disabling condi-

tion. See generally S. Rep. 93-1297, *supra,* at 37-39, 50, 63-64. An individual who is contagious in respect to a serious, potentially disabling disease is not necessarily "disabled" or "impaired" himself and, consequently, even when he is impaired, discrimination solely on the basis of his contagiousness is not itself discrimination on the basis of his handicap.

4. To be sure, contagiousness may also lead to a disabling condition and, hence, a handicap.[16] In addition, a person who is contagious may, either on his own initiative or due to the reactions of others towards his contagiousness, be sharply restricted in his social and professional activities. Neither of these circumstances, however, suggests that contagiousness is itself a handicap for the purposes of Section 504 of the Rehabilitation Act.

a. The possibility that an individual's contagiousness may cause a disabling condition in others does not, without more, render discrimination on the basis of an individual's contagiousness the legal equivalent of discrimination on the basis of a handicap possessed by the individual, as required by Section 504. Cf. *Bowen* v. *American Hospital Ass'n,* No. 84-1529 (June 9, 1986), slip op. 19 (emphasis in original) (plurality opinion) ("If, pursuant to its normal practice, a hospital refused to operate on a black child whose parents had withheld their consent to treatment, the hospital's refusal would not be based on the race of the child even if * * * the parents based *their decision* * * * [on] the race of the child"). The contrary view—that a causal connection between contagiousness and a disabling condition is sufficient to trigger Section 504—would suggest quite incorrectly that a federal re-

[16] Accordingly, discrimination on the basis of contagiousness is distinct from discrimination based on a human characteristic, such as stature (see page 11, *supra*), that is in most instances wholly unrelated to the presence of a handicap.

cipient would violate Section 504 by discriminating against a nonhandicapped individual because the latter had caused a third person to become handicapped.[17]

b. Nor does the fact that a contagious individual may be sharply restricted in his interactions with others, who are reluctant to deal with him, render contagiousness a handicap under Section 504. Section 504 is not intended to redress the full variety of human characteristics that may result in sharply restricted lives or in discriminatory treatment. It is only discrimination based on an actual or perceived handicap, and not all types of discrimination triggered by unfavorable societal attitudes towards a human characteristic, that is entitled to protection under the Rehabilitation Act. Otherwise, a host of personal characteristics that others might find offensive or even threatening—ranging from personal hygiene or appearance to a propensity for criminal or violent conduct—would constitute handicaps. Section 504 would, in effect, ban discrimination based on any attitude that restrains the opportunities of each person to live a full and productive life. Whatever the merits of such a regime, it was plainly not enacted by Section 504. See 45 C.F.R. Pt. 84, App. A, at 310 ("[O]nly physical and mental handicaps are included. Thus, environmental, cultural, and eco-

[17] In the hypothetical described, the actual handicap induced in a third person triggers the discriminatory treatment, while in this case, discrimination is based merely on the *fear* of inducing such a handicap in third persons. Discrimination on the basis of a fear of third persons' becoming disabled, however, is not the equivalent of discrimination on the basis of an actual or perceived handicap in the person discriminated against. Cf. *Metropolitan Edison* v. *People Against Nuclear Energy*, 460 U.S. 766, 775 (1983) (emphasis in original) ("[A] *risk* of an accident is not an effect on the physical environment. A risk is, by definition, unrealized in the physical world.").

nomic disadvantage are not in themselves covered.").[18] Section 504 focuses on one and one problem only—discrimination against physically and mentally handicapped persons on the basis of their (actual or perceived) handicaps.[19]

5. Because contagiousness is not itself a handicap within the meaning of the Rehabilitation Act, Arline can maintain an action under Section 504 only if the school board's decision to dismiss her was either (1) a mere pretext for handicap discrimination or (2) based on a false stereotypical judgment, condemned by Section 504, solely relating to a handicap. The record in this case, however, supports neither proposition.

[18] The Department of Health and Human Services regulations, which most agencies have adopted verbatim, define the statutory phrase "is regarded as having such an impairment" (29 U.S.C. 706(7)(B)(iii)) as meaning that an individual is handicapped if he "has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment" (45 C.F.R. 84.3(j)(2)(iv)(B)). If read to provide that the impairment need not itself limit major life activities or be perceived to limit major life activities in order to constitute a "handicap," this definition would plainly extend impermissibly beyond the bounds of the statute, which refers to an "impairment which substantially limits one or more of such person's major life activities" (29 U.S.C. 706(7)(B)(i)). Because, however, contagiousness is not a "physical or mental impairment" in the first instance, the validity of this regulatory definition need not be reached in this case.

[19] This conclusion cannot be avoided by a disparate impact analysis that looks to the impact on the disabled tuberculosis sufferers of discrimination based on contagiousness. This Court has "reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under § 504" (*Alexander* v. *Choate*, slip op. 11 & n.19), and, assuming Section 504 reaches some instances of disparate impact, has focused only on disparate impacts resulting from failure to make reasonable accommodations to provide meaningful access to the handicapped (slip op. 11-14). Under the Court's reasoning, disparate impact analysis might invalidate the failure to eliminate architectural barriers because such failure would deny meaningful access to handicapped individuals. Where there is no denial of meaningful

First, the record in this case does not suggest that contagiousness was a mere pretext for discrimination based on any disabling effects of Arline's tuberculosis. The school board dismissed Arline, who had been a teacher in the school system for 13 years, only after she suffered her third relapse and the school board learned she was contagious. Pet. App. 2; J.A. 48-51, 61-64, 80-81. The school board's sole concern was the health risk posed by her to persons in the school system, particularly to young students (*ibid.*) There is no suggestion in the record that the school board singled out Arline for discriminatory treatment because she was or was perceived to be physically disabled by tuberculosis.[20]

Second, the school board's dismissal of Arline was plainly not rooted in the type of false stereotypical judgment about the abilities of handicapped individuals deemed impermissible by Section 504 (see pages 11-12, *supra*). The risks of contagiousness may exist wholly apart from the potentially disabling effects of a disease like tuberculosis, and a belief that an individual is contagious—whether reasonable or not—need not depend on a perception that an individual is disabled by reason of a disease. In this case, the school board's belief in Arline's contagiousness was in no sense a conclusion drawn from a perception that she was disabled by tuberculosis. Thus, this case is different from those involving a person in a wheelchair or a blind person who is, on that account, falsely stereotyped as being unable to perform certain tasks.[21] This case is also distinct from the case—clearly covered by Section 504—of an actually handicapped person who suffers antipathy simply based upon his handicap. Here, the school board's decision rested directly on facts indicating her contagiousness, which itself is neither a handicap nor a stereotyped conclusion based on a handicap. The school board relied on a report of a state health official who recommended that Arline not be permitted to continue teaching elementary school and acted pursuant to its perceived obligation to protect the school system from the health hazards presented by serious communicable diseases.[22]

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access (*id.* at 14-18), or, *a fortiori*, where there is no handicap and therefore no duty of reasonable accommodation, the showing of disparate impact has no legal significance under Section 504. As explained in the text above, contagiousness is not a handicap and, consequently, there is no duty of reasonable accommodation applicable to it.

[20] In at least this one respect, this case differs from *New York State Ass'n for Retarded Children* v. *Carey*, 612 F.2d 644, 649 (2d Cir. 1979), in which the court of appeals declared unlawful efforts by school officials to segregate retarded children with hepatitis B virus from other children, without making any comparable effort to segregate nonretarded children who also carried the contagious virus. See also *District 27 Community School Bd.* v. *Bd. of Education*, 130 Misc.2d 398, 415, 502 N.Y.S.2d 325 (1986) ("if the policy were to have been the exclusion of children diagnosed as having AIDS while not excluding children with ARC or those merely infected with the HTLV-III/LAV virus, it would constitute discrimination under section 504 of the Rehabilitation Act").

[21] The more difficult issue, not raised in this case, is whether Section 504 bars discrimination based on a false stereotyped conclusion derived solely from the fact that the person is handicapped, which false conclusion does not concern the impairment of the performance of major life activities. Would, for example, a federal program manager be proscribed from discriminating against a person in a wheelchair on the genuine though wholly unreasonable belief, derived solely from his handicap, that he was contagious in respect to some imagined "wheelchair" disease? Such a stereotype would not concern ability to perform major life activities. It would, however, derive directly *and solely* from the presence of the disability. This issue is not presented in this case because the record makes clear that the school board's belief in Arline's contagiousness was not a conclusion, stereotyped or otherwise, based solely on any disability which she may have had.

[22] Of course, the reasonableness of a claim that an individual is contagious is highly relevant to the Section 504 inquiry. For instance, the less reasonable the fear of contagion, the less credible is the assertion that fear of contagion was anything but a pretext for handicap

B. Arline Was Not "Otherwise Qualified" To Be An Elementary School Teacher Within The Meaning Of Section 504

Even if discrimination on the basis of contagiousness is handicap discrimination under Section 504, Arline's complaint should be dismissed because she was not "otherwise qualified" to be an elementary school teacher, as required by Section 504 . The statutory requirement that the handicapped individual must be "otherwise qualified" in order to maintain a Section 504 claim expressly acknowledges the commonsense notion that in certain circumstances a particular disability may justify discriminatory treatment. See *Southeastern Community College* v. *Davis,* 442 U.S. 397, 405-407 (1979). As this Court noted in *Alexander* v. *Choate, supra,* "the handicapped typically are *not* similarly situated to the nonhandicapped" (slip op. 10 (emphasis added)).[23]

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discrimination. Cf. *Knickerbocker Merchandising Co.* v. *United States,* 13 F.2d 544, 546 (2d Cir. 1926) (Hand, J.). But once a finding of pretext is negated and it is established that the determination that the individual is contagious is not handicap-based (see note 21, *supra*), the Section 504 inquiry comes to an end.

[23] Application of the "otherwise qualified" limitation, however, requires some threshold scrutiny of the purported "qualifications" of the relevant federal program or activity to ensure that those qualifications are not themselves the product of discrimination, based either on affirmative animus or misguided stereotypes. Otherwise, past discrimination would, in effect, justify continued discrimination, contrary to congressional intent. For "[i]t is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program" (*Southeastern Community College* v. *Davis,* 442 U.S. at 412). Hence, although Section "504 is concerned with discrimination and with discrimination alone" and " 'neither the language, purpose, nor history of [Section] 504 reveals an intent to impose an affirmative-action obligation' on recipients of federal financial assistance" (*Bowen* v. *American Hospital Ass'n,* No. 84-1529 (June 9, 1986), slip op. 29 (plurality opinion) (quoting *Southeastern Community College* v. *Davis,* 442

The court of appeals erred in holding that remand was necessary in this case both to determine whether Arline was "otherwise qualified" to retain her position as an elementary school teacher and to consider whether the school board must accommodate her contagiousness by employing her in a different capacity in the school system. In our view, the current record leaves no doubt that Arline was not "otherwise qualified" for her teaching position and remand on that issue is, accordingly, unnecessary. Arline was not "able to meet all of [her employment responsibilities] in spite of [her contagiousness]" (*Southeastern Community College* v. *Davis,* 442 U.S. at 406); nor was the school board obliged to find her some other employment in the school system where she would be qualified.

The state health official, the school superintendent, and the school board all determined (J.A. 13, 48-51, 61-64, 80-81), and the trial court expressly found (Pet. App. 14-15), that the health risks presented by Arline's contagiousness made her unqualified to continue teaching elementary school. In light of the uncontroverted testi-

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U.S. at 411)), Section 504's guarantee of equal and evenhanded treatment may require some efforts at accommodation. See *Alexander* v. *Choate,* No. 83-727 (Jan. 9, 1985), slip op. 12-14. For this reason, federal regulations implementing Section 504 invariably link assessment of the qualifications of a handicapped individual to a requirement that a federal grantee or federal agency reasonably accommodate the needs of handicapped persons or otherwise remove unnecessary impediments to their participation or employment. See 45 C.F.R. 84.3(k)(1), 84.12(a), 84.22, 84.23, 84.44; see also 29 C.F.R. 1613.702(f), 1613.704 (guidelines on Section 501 (29 U.S.C. (& Supp. II) 791) prohibition on handicapped discrimination in federal employment). The "reasonable accommodation" obligation imposed by these regulations, however, does not require " 'fundamental' or 'substantial' modifications to accommodate the handicapped" (*Alexander* v. *Choate,* slip op. 12 (quoting *Southeastern Community College* v. *Davis,* 442 U.S. at 410, 412-413)).

mony in the record regarding the contagious nature of Arline's affliction and the heightened susceptibility of young children (see J.A. 4-43), we see no basis for second-guessing either the school board's assessment of the health risks presented (cf. *Youngberg* v. *Romeo,* 457 U.S. 307, 322-323 (1982)) or its determination that those risks were unacceptably high. Certainly, Section 504 does not bar the school board from considering the public health risks associated with continued employment of Arline. See *Southeastern Community College* v. *Davis,* 442 U.S. at 409; *Strathie* v. *Department of Transportation,* 716 F.2d 227, 232 (3d Cir. 1983); *Doe* v. *New York University,* 666 F.2d 761, 776 (2d Cir. 1981); see also 29 C.F.R. 1613.702 (f) (" 'Qualified handicapped person' means * * * a handicapped person who * * * can perform the essential functions of the position in question without endangering the health and safety of * * * others.").[24]

Finally, the court of appeals erred in remanding for further proceedings to consider whether the school board might reasonably accommodate Arline's "handicap" by employing her in some different capacity in the school system (*e.g.*, as a teacher of older students) (Pet. App. 10-11). Although Section 504 may require some reasonable accommodation of the needs of the handicapped (see note 23, *supra)*, that accommodation obligation does not extend to employing Arline in a *different* capacity. Teaching older students would be a different job.

Section 504's nondiscrimination mandate requires only that covered employers provide handicapped individuals with "evenhanded" treatment and does not require that

[24] The statutory definition of "handicapped individual" expressly provides that safety concerns are relevant to discrimination against alcoholics and drug abusers by excluding such persons from Section 504 coverage when they "constitute a direct threat to * * * the safety of others" (29 U.S.C. 706(7); see also 124 Cong. Rec. 30323-30324 (1978) (remarks of Sen. Williams)).

they receive "preferential" treatment. See *Alexander* v. *Choate,* slip op. 16; see *Bowen* v. *American Hospital Ass'n,* slip op. 29-30. "Evenhanded treatment" does not, moreover, mean that an employer must under the guise of "accommodation" hire a handicapped person because he may be unqualified for *other* jobs (or, conversely, hire him for a different job because he is unqualified for his current position). Accommodation obligations pertain only to the qualifications of a handicapped individual for a particular job.[25] Such preferential treatment is, however, precisely what the court of appeals erroneously ordered the district court to consider in this case on remand.

[25] The exclusive focus of implementing agency regulations is on reasonable accommodation to allow the handicapped individual to "perform the essential functions *of the job in question*" and not with reasonable accommodations that provide the individual with a different job. See 45 C.F.R. 84.3(k)(1) (emphasis added); see also 45 C.F.R. Pt. 84, App. A, at 312. Notably, federal regulations implementing the federal government's obligation, as employer, not to discriminate on the basis of handicap similarly define "qualified handicapped individual" in terms of the "position in question." See 29 C.F.R. 1613.702(f); *Carty* v. *Carlin,* 623 F. Supp. 1181, 1188-1189 (D. Md. 1985) ("The Rehabilitation Act and its accompanying regulations indicate that the law requires reasonable workplace modification or accommodation in order to allow the handicapped person to remain in that position. There is nothing in the law or accompanying regulations to suggest that reasonable accommodation requires an agency to reassign an employee to another position.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1985

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of Schools of Nassau County, FL,
Petitioners

v.

GENE H. ARLINE,
Respondent

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICUS CURIAE* CONGRESSMEN WILLIAM E. DANNEMEYER, ROBERT K. DORNAN, EARL HUTTO, HELEN BENTLEY, JIM HANSEN, LARRY CRAIG, JOE BARTON AND SENATOR JESSE HELMS

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QUESTIONS PRESENTED

1. Whether an individual with a contagious disease should be protected by the Rehabilitation Act of 1973.

2. Whether a ruling by this Court affirming the lower court decision would result in granting affirmative action rights to a category of persons unintended by Congress.

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INTERESTS OF AMICUS CURIAE

Congressman William Dannemeyer et al. appear before this Court as amici curiae with the written consent of Respondent, Gene H. Arline, and Petitioners, the School Board of Nassau County, Florida and Craig Marsh. The written consent of all parties to this suit is contained in letters which have been filed with the Clerk of this Court.

Congressmen William Dannemeyer et al. are United States Representatives. Senator Jesse Helms is a United States Senator.

Each of the Congressional amici has exercised his legislative prerogative on various legislative matters concerning federal issues since the time he was elected. The movant Congressional amici seek to act as friends of the court in the instant case because it raises vital and substantial issues of federal law.

Amici can bring to this case a perspective not adequately represented by the other parties. Whereas the Respondent is primarily concerned with retaining employment and the Petitioner is primarily concerned with protecting the health and welfare of pupils and teachers in Nassau County which may be threatened by the presence of an employee with tuberculosis, amici are aware of the broader picture.

In the instant case, amici urge this court to overturn the decision of the Eleventh Circuit and to find that individuals with tuberculosis and other contagious diseases are not protected by the anti-discrimination provisions of the Rehabilitation Act of 1973. Amici believe that a ruling by this Court affirming the Eleventh Circuit decision would pose a threat of unprecedented magnitude and a result clearly unintended by Congress in its enactment of the Rehabilitation Act of 1973 and in amendments to that Act in 1978.

STATEMENT OF THE CASE

Amici adopt the recitation of facts contained in the brief for the Petitioner, Nassau County School Board, in the interest of judicial economy.

SUMMARY OF ARGUMENT

Amici submit that the United States Court of Appeals for the Eleventh Circuit erroneously held that tuberculosis is a "handicap" within the meaning of 29 U.S.C.

706(7)(B) and that persons with that disease are protected by the anti-discrimination provisions of The Rehabilitation Act of 1973. 29 U.S.C. 793 and 794.

Amici further submit that neither the statute on its face nor the legislative history of The Rehabilitation Act of 1973 supports the premise that persons with contagious disease should receive the full benefits and protections of the law intended for "handicapped" persons.

Finally, amici contend that the ramifications of a decision affirming the holding of the Eleventh Circuit would be far-reaching and would result in consequences unintended by Congress.

ARGUMENT

I. AN INDIVIDUAL WITH A CONTAGIOUS DISEASE IS NOT PROTECTED BY THE ANTI-DISCRIMINATION PROVISIONS OF THE REHABILITATION ACT OF 1973.

A. The statute on its face and through subsequent interpretation precludes the inclusion of an individual with a contagious disease within the Act's protection.

The Rehabilitation Act of 1973 proscribes discrimination against handicapped individuals in programs or activities which receive federal funds or in programs conducted by the federal government. To obtain the protection of the Rehabilitation Act of 1973, an individual must satisfy five conditions of the Act: First, the individual must be "handicapped." 29 U.S.C. 706(7)(B) [hereinafter Section 706(7)(B)]. Second, the individual must be "otherwise qualified." Third, the individual must be denied the benefits of, or be subjected to discrimination under a covered program or activity. Fourth, the individual must be discriminated against "solely by reason of his handicap". Fifth, the discrimination must occur in a program receiving federal monies or in one conducted by a government agency. 29 U.S.C. 794. *See*

Prewitt v. U.S. Postal Service, 622 F.2d 292 (5th Cir. 1981). Because the issue before this Court is whether an individual with a contagious disease should receive the protections mandated by the Act, this brief will address only the first two elements of the statute.

1. *An individual with a contagious disease is not "handicapped".*

It is clear that an individual who has contracted a contagious disease does not fall squarely within the Act's definition of "handicapped". The Act defines a "handicapped individual" as one who (1) has a physical or mental impairment which substantially limits one or more major life activities, (2) has a history of such impairment, or (3) is regarded as having such an impairment. Section 706(7)(B). Because an individual who has contracted a contagious disease is not always limited in one or more major life activities, these individuals should not be included within the definition of "handicapped".

The Act does not clarify the meaning of this definition but regulations promulgated pursuant to this Act narrowly define each element.

The regulations state that "physical or mental impairment" is:

> (A) any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular, reproductive; digestive; genito-urinary, hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities. 45 C.F.R. 84.3(j)(2)(i) (1985).

Similarly, an individual who "has a record of such impairment" is defined as a person who has "a history of,

or has been classified [or misclassified] as having a mental or physical impairment that substantially limits one or more major life activities."

45 C.F.R. 84.3(j)(2)(iii) (1985).

A person who "is regarded as having an impairment" must have:

> (A) a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (B) is substantially limited in major life activities only as a result of the attitude of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by the recipient as having such an impairment.

45 C.F.R. 84.3(j)(2)(iv) (1985).

Lower courts have examined the meaning of the term "handicapped" and have found that various conditions fall within its definition. *Holly v. City of Naperville*, 603 F. Supp. 220 (N.D. Ill. 1985) (blindness in one eye is a handicap); *Bento v. ITO Corporation of Rhode Island*, 599 F. Supp. 731 (D.R.I. 1984) (heart condition can be a handicap); *Fitzgerald v. Green Area Education Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984); (cerebral palsy, nocturnal epilepsy and dyslexia are handicaps). The Fifth Circuit has defined "impairment" as "dimunition in quality, value, excellence or strength." *De la Torres vx. Bolger*, 781 F.2d 1134, 1137 (5th Cir. 1986).

Amici do not disagree that respondent suffers an "impairment". As found by the lower court, her tuberculosis did affect her respiratory system. Respondent does not allege, however, that it is this impairment that constitutes her handicap and prevents her from working. To the contrary, respondent implies that she is physically capable of teaching. It is the contagious nature of the disease which prevents her from working, not the physical nature of the impairment. Therefore, respondent can-

not be classified as "handicapped" because her impairment does not limit a "major life activity". Section 706(7)(B).

This Court should find that a contagious disease does not meet the definition of "handicapped". Section 706 (7)(B). An individual with a contagious disease must show that the disease causes some identifiable physical impairment exclusive of communicability. To include persons with contagious diseases within the definition of "handicapped" would expand the meaning beyond the plain language of the statute and regulations promulgated pursuant thereto. An individual who has contracted a contagious disease does not always experience sufficient "impairment" to limit major life activities. *See* "Memorandum from Charles J. Cooper, Assistant Attorney General, Office of the Legal Counsel for Ronald E. Robertson, General Counsel, Department of Health and Human Services", at 19 (June 20, 1986). With some contagious diseases, the victim may carry the virus but never experience a "dimunition in quality, value, excellence or strength", and thus never experience "impairment". *See De La Torres v. Bolger*, 781 F.2d 1134, 1137 (5th Cir. 1986). Consequently, an individual with a contagious disease does not fall within the Act's definition of "handicapped".

2. *An individual with a contagious disease is not "otherwise qualified."*

To receive the protections of the Act, an individual must be "otherwise qualified" without requiring unreasonable accommodation at the workplace or in the program.

In 1979, this Court was asked to determine the meaning of "otherwise qualified" in a case involving a nursing school which refused to admit a deaf applicant to the nursing program. *Southeastern Community College v. Davis*, 442 U.S. 397 (1976). In that case, the Court stated that the protections of the Rehabilitation Act applied only to those handicapped persons "who are able to meet all of a program's requirements in spite of his handicap." *Id.* at 406. Because the plaintiff's deafness prevented her from safely performing in both her training program and in her proposed profession, the court held that the plaintiff was not protected by the Rehabilitation Act.

Subsequent lower court decisions have followed closely the precedent set in *Southeastern Community College*. In *Prewitt v. U.S. Postal Service*, 662 F.2d 292 (5th Cir. 1981), the court was asked to determine whether the U.S. Postal Service violated the Rehabilitation Act by refusing to employ a physically impaired applicant as a distribution clerk. The court described the ultimate test as whether, with or without reasonable accommodation, a handicapped individual who meets all employment standards except for the challenged discriminatory criterion "can perform the essential functions of the position in question without endangering the health and safety of the individual or others." *Id.* at 310.

A minimum requirement of most programs or occupations is the ability to work with others in close proximity without endangering their health or safety. Physically and mentally impaired individuals pose a threat on the job only if they are unable to adequately perform assigned tasks. In contrast, an individual with a contagious disease jeopardizes the health and safety of others merely by being present and sharing workspace. Therefore, an individual who has contracted a contagious disease cannot "meet all of a program's requirements in spite of his handicap" because the infectious nature of the disease is, itself, the threat. *Id.* at 406.

In accommodating the "otherwise qualified individual" the recipient is required to "make reasonable accommodation for the known physical or mental limitations of a qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its pro-

gram." 45 C.F.R. 84.12(a) (1985). In a recent Eighth Circuit case, the court held that the Rehabilitation Act does not contemplate that an employer receiving federal funds will launch major restructuring of projects and facilities regardless of cost. *Gardner v. Morris*, 752 F.2d 1971 (8th Cir. 1985). These cases serve as strong precedent for this court to find that Petitioner does not fall within the protection of the Rehabilitation Act.

The apparent thrust of the statutes, the regulations and case law is to compensate individuals for their handicap by building ramps, by acquiring hearing and sight learning aids and by providing reasonable accommodations which allow otherwise qualified individuals to become productive members of society. They do not require a recipient of federal funds, such as an employer, to launch major restructuring of projects and facilities regardless of cost. For an employer to accommodate an employee who carries a contagious disease, it may be necessary to isolate the employee from susceptible co-workers or clients. In some cases, the employer may be forced to engage in major safety efforts such as constructing glass barriers, wearing protective garments and utilizing video instruction techniques to ensure the separation of healthy and infected employees. In consumer-oriented industries, it may even require the employer to assume substantial losses in business and/or goodwill.

Because accommodation would be unreasonable and costly, an individual with a contagious disease should not receive the protections of the Rehabilitation Act of 1973.

B. The legislative history of the Rehabilitation Act does not contemplate the inclusion of persons with contagious diseases within the anti-discrimination protections of the Rehabilitation Act.

The lack of reference to contagious diseases in the legislative history of the Rehabilitation Act is conspicuous by its absence. S. 318, 93 Cong., 2d Sess., *reprinted in* 1973 U.S. Cong. & Ad. News 2076, 2094; S. Conf. Rep.

391, 93 Cong., 2d Sess. *reprinted in* 1973 U.S. Cong. & Ad. News 2143, 2145; H.R. Rep. 244, 93 Cong., 2d Sess. 7 (1972); H.R. Rep. 1149, 95 Cong., 2d Sess., *reprinted in* U.S. Cong. & Ad. News 7312, 7333 (1978); H. Conf. Rep. 1780, 95 Cong., 2d Sess., *reprinted in* U.S. Cong. & Ad. News 7375, 7413; S. Rep. 890, 95 Cong., 2d Sess. (1977). Contrary to the view of the Court below, *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 764 (11th Cir. 1985),[1] Congress did not choose to exclude alcoholics and drug abusers and therefore, by implication, include contagious diseases. Neither the House nor the Senate ever contemplated including contagious diseases. By amending the Rehabilitation Act in 1978, Congress was specifically reacting to a 1977 Attorney General's Opinion which held that alcoholics and drug abusers were "handicapped individuals" within the meaning of the Act. 43 Op. Att'y Gen. 12 (1977).

The Senate expressed its strong concern about the need to retain health and safety protections. During the Floor debate on the 1978 amendment to exclude drug and alcohol abusers from the definition of "handicapped", Senator Cannon specified the need for this clarifying amendment by citing regulations and rulings of the Department of Labor and the Department of Health, Education, and Welfare which had the effect of "compelling airlines and other companies holding Federal Government contracts to actively recruit and employ alcoholics and drug addicts . . . without regard to the character or sensitivity of the work involved." 124 Cong. Rec. S.

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[1] Circuit Judge Vance concluded that "there is no . . . legislative direction . . . Neither the regulations nor the statutory language give any indication that chronic contagious diseases are to be excluded. To the extent that the statute and regulations express any intent to limit the scope of Section 504, Congress' failure to exclude contagious diseases from coverage when it specifically excluded alcoholism and drug abuse implies that it harbored no similar disapproval about them." *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 764 (11th Cir. 1985).

30322 (daily ed. September 20, 1978). In support of the amendment, Cannon stated that such a blanket policy could potentially affect public confidence in the "safety and reliability" of air transportation. *Id.* at 30322. The Senate adopted his amendment by voice vote.

The House of Representatives was concerned about public health and safety as well. Throughout the legislative history of Section 504 of the Rehabilitation Act, the need to preserve public "safety" was hailed as a public policy goal of paramount importance. In his statement before the Subcommittee on Select Education, concerning his amendment to exclude drug abusers and alcoholics, Congressman Henry Hyde discussed the necessity of protecting public safety. Rehabilitation Act of 1973: Oversight Hearings on Amendments Before the Select Subcomm. on Education of the House Comm. on Education and Labor, 95th Cong., 2d Sess. (1978).

"The Congress needs to give thoughtful and wide-ranging consideration to the needs of the handicapped person, balanced against the realities of public safety, economics and commonsense." Id. at 502. In that same statement, Congressman Hyde posed a number of rhetorical questions aimed at emphasizing the absurdity of applying affirmative action provisions to drug abusers and alcoholics:

> What will OSHA inspectors say about the safety of a plant where unrehabilitated drug addicts and alcoholics are working? Are schools which receive federal funds now mandated to seek such persons out for employment? Will mass transit systems be required to accept such applicants as bus drivers and motormen? How does an employer determine whether an applicant can really function adequately and for a sustained period of time?

Id. at 502

The same concerns which prompted Senator Cannon and Congressman Hyde to formulate this amendment are tantamount to consideration of defining contagious diseases as a "handicap" under Section 706(7)(B). An

employer's decision to hire an individual with an airborne contagious disease, such as tuberculosis, represents a decision to knowingly expose other employees and clientele to the threat of infection. *See* Bennett & Searl, COMMUNICABLE DISEASE HANDBOOK, at 228-252 (1982). Although in some cases communicable diseases are not easily transmitted in the workplace, thereby alleviating the threat of infection, they still raise issues of longevity, continuity and reliability in the workplace. *Id.* at 167-203.[2]

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[2] Benenson, Abram S., CONTROL OF COMMUNICABLE DISEASES IN MAN, (14th ed. printing 1985). The modes of transmission and symptoms illustrate the divergent characteristics which must be considered when a victim of contagious disease is present in the workplace.

Tuberculosis is transmitted in "airborne droplet nuclei" from sputum of infectious persons. *Id.* at 411. Susceptibility is general and the period of communicability is as long as infectious tubercule bacilli are being discharged in the sputum. *Id.* at 412. Tuberculosis symptoms which may decrease occupational efficiency include fatigue, weight loss, cough, chest pain, hemoptysis, hoarseness, and involvement of lymph nodes, pleura, pericardium, kidneys, bones and joints, larynx, skin, intestines, peritoneum or eyes. *Id.* at 410.

Acquired Immune Deficiency Syndrome. (AIDS) is primarily transmitted from person to person through sexual contact, sharing unclean needles, or through the transfer of blood or blood products. The crude case fatality rate is 46%, increasing with the duration since diagnosis. *Id.* at 3. Symptoms which may decrease work productivity include lymphadenopathy, anorexia, chronic diarrhea, weight loss, fever, and fatigue progressing until an opportunistic disease develops. Alternatively patients may present with a severe, life-threatening opportunistic disease such as pneumocystis carinii pneumonia, chronic enteric cryptosporidiosis, disseminated strongyloidiasis, toxoplasmosis of the CNS or disseminated atypical mycobacteriosis, pulmonary or gastrointestinal or CNS cytomegalovirus infection, chronic ulcerative mucocutaneous or disseminated herpes simplex infection, progressive multifocal leukoencephalopathy, Kaposi's sarcoma and primary lymphoma limited to the brain. *Id.* at 3.

Syphillus is transmitted by direct contact with infectious exudates from moist early lesions of skin and mucous membrane, body fluids and secretions (saliva, semen, blood, vaginal discharges) of

By their nature, persons with contagious diseases, drug abusers and alcoholics require different treatment than those with impairments traditionally associated with the term "handicapped". For example, the loss of an arm may not affect an individual's ability to manage an office, ensure the health and safety of coworkers, or affect an employee's longevity of service or reliability of attendance. In contrast, a person with an airborne communicable disease, such as tuberculosis, may unwittingly infect other employees and clients merely by his presence in the workplace. Similarly, while a sexually transmitted disease, such as Acquired Immune Deficiency Syndrome [hereinafter AIDS], may or may not pose an immediate threat to coworkers,[3] it certainly affects the reliability and lon-

infected persons during sexual contact. *Id.* at 377 . Susceptibility is universal although only 10% of exposures result in infection. The period of communicability is variable and indefinite. Death or serious disability does not occur during early stages. Late manifestations shorten life, impair health and "limit occupational efficiency."

[3] While AIDS is transmitted primarily by sexual contact and through blood or blood products, Harvard research professor William Haseltine reports that "anyone who tells you categorically that AIDS is not contracted by saliva is not telling you the truth . . . There are sure to be cases . . . of proved transmission through casual contact. Dershowitz, EMPHASIZE SCIENTIFIC INFORMATION, N.Y. Times, at A27, col. 2 (Mar. 18, 1986). *See* also Grutsch & Robertson, THE COMING OF AIDS, AM. SPECTATOR, at 13, n.2 (Mar. 1986). In addition, the possibility of other transmission routes is implicated by scientific experiment which found that infectious cell-free virus could be recovered from dried material up to three days later if kept at room temperature. In an aqueous environment, infectious virus survived longer than 15 days at room temperature (23 to 27 degrees) and 11 days at 36-37 degree temperatures. Even under the more rigorous heating conditions commonly used to inactivate organisms, infectious virus was detected after three hours of exposure. L. Resnick, M.D. et al. *Stability and Inactivation of HTLV-III/LAV Under Clinical and Laboratory Environment,* THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, (April 11, 1986). This data indicates that the virus is not as fragile as once claimed and theoretically could be transmitted by saliva. See McKeever, THE AIDS NEWSLETTER (June 1986).

gevity of the infected individual and affects his ability to "function adequately and for a sustained period of time." [4]

Congress never intended to include individuals with contagious diseases within the anti-discrimination and affirmative action provisions of the Act. When Congress amended this Act in 1978, they specifically excluded "drug abusers and alcoholics" from the affirmative action provisions of the Act when this category of individuals threaten the "property or safety of others". Section 706(7)(B). Had Congress ever contemplated applying this Act to individuals with contagious diseases, they undoubtedly would have extended the 1978 exclusion to such individuals when they threaten the "safety of others".

[4] AIDS is 100% fatal. See *NIH Conference—The Acquired Immunodeficiency Syndrome: An Update,* 102 ANNALS OF INTERNAL MEDICINE, 802 (1985) ("No patient who has unequivocal acquired immunodeficiency syndrome has yet been cured.") *Council Report: The Acquired Immunodeficiency Syndrome,* 252 JAMA 2037, at 2041 (1984). ("At present, there are no cases of AIDS in which the immune system has been reported to have recovered. Thus far, most patients with AIDS have eventually succumbed.") AIDS is manifested in such symptoms as persistent weight loss, intermittent fever, chronic diarrhoea, generalized lymphadenopathy, progressive encephalapathy, military tuberculosis, malaria bacterial pneumonia, and a variety of lethal opportunistic infections including a cytopathic effect on the brain. Searle, John, 78 JOURNAL OF THE ROYAL SCIENCE OF MEDICINE, 613 (August 1985).

A recent study of Danish homosexuals concluded that "most" persons infected with HTLV-III [AIDS] will develop AIDS or some measurable immunologic defect or clinical abnormality. Drs. Melbye, Biggar, Ebbesen, Neuland, Goedert, Faber, Lorenzen, Skinhoj & Gallo, "Long-Term Seropositivity for Human T-Lymphotropic Virus Type III in Homosexual Men Without the Acquired Immunodeficiency Syndrome: Development of Immunologic and Clinical Abnormalities, *Annals of Internal Medicine,* Volume 104, April (1986). This study indicates that almost all persons who are antibody positive but do not exhibit clinical symptoms of AIDS will develop AIDS or some measureable defect. Robertson, A.D.J., *The Virulence of AIDS,* THE WALL STREET JOURNAL at 33, col. 1 (October 31, 1985). The implication then is that any person who tests antibody positive will be significantly affected and ultimately job performance will suffer.

Therefore, despite the absence of any direct reference to contagious diseases in the legislative history of Section 504 of the Rehabilitation Act, the intent to preserve and prioritize safety and to refrain from overburdening the employer was clearly evident in both the House and Senate proceedings.

C. Historically, an individual with a contagious disease has been treated differently than an individual with a handicap.

Historically, individuals with contagious diseases have been quarantined and isolated.[5] In contrast persons with

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[5] *See* 4 Blackstone, W., COMMENTARIES ON THE LAW OF ENGLAND at 161-162 (1769). By statute, local officials could order infected persons to remain in their houses. Violation of a quarantine order was considered a felony. In 1794, Congress enacted a law in response to the outbreaks of yellow fever in New York and Philadelphia which permitted them to convene as needed in case of "prevalence of contagious sickness". Williams, Dr. R.C., THE UNITED STATES PUBLIC HEALTH SERVICE *1798-1950*, at 68 (1984). Current authority authorizes the Surgeon General to make and enforce regulations necessary to prevent the introduction, transmission or spread of communicable diseases from foreign countries to the U.S. or from state to state. 42 U.S.C. 264 (1944).

Pursuant to these statutes, broad authority was delegated by Congress to the Surgeon General and the Secretary of the Treasury to restrict or quarantine all vessels or vehicles coming from any foreign port or country where any contagious disease *may* exist. 20 Op. Atty. Gen. 468 (1892). Under a March 27, 1890 Act entitled "An Act to Prevent the Introduction of Contagious Diseases From One State to Another, and for Punishment of Certain Offenses", the Secretary of the Treasury was authorized by the President to take steps to prevent the spread of cholera, yellow fever, smallpox or plague. 22 Op. Att'y. Gen. 106 (1898).

Specific historical incidents of quarantine include:

In Venice during the Middle Ages, persons suspected of having bubonic plague were required to spend 40 days in open air and sunlight and any who had contact with them were isolated. R.C. Williams, M.D. *The United States Public Health Service 1798-1950*, p. 68.

In 1710, England passed a rigorous quarantine Act and foreign ships from Cyprus, where plague was prevalent, were burned. *Id.* at 65.

—In 1866, Congress enacted a joint resolution to quarantine as necessary and proper to guard against the introduction of cholera. *Id.* at 68.

—In 1909 absolute quarantine for 3 months was imposed on all members of families affected by polio. In 1916, the northeastern part of the U.S. suffered one of the most devastating epidemics of polio and drastic quarantine restrictions were imposed. Paul, John R., M.D., A HISTORY OF POLIOMYELEITIS, at 148-149 (1971).

physical or mental handicaps, while maintaining essential freedoms, have been relegated to unproductive societal roles. Even today, this distinction exists. Persons with contagious diseases, or those who abuse alcohol or drugs, are legally excluded from this country under our Immigration laws. 8 U.S.C. 1182(a)(5) (1952), 8 U.S.C. 1182(a) (1961). Current law bars immigrants with communicable diseases such as 'chanchroid, gonorrhea, infectious leprosy, active tuberculosis, syphillis, lymphogranuloma, venereum and granuloma inguinale" from entering the U.S. 14 C.F.R. 34 (1986). The federal government has proposed that AIDS be added to this list. *Id.* Persons with physical defects, however, are only excluded if the "disability is determined to be of such a nature that it may affect the ability of the alien to earn a living." 8 U.S.C. 1182(a)(7) (1952).

The apparent irony of a decision in favor of Respondent cannot be overlooked. Should this Court find that persons with a contagious disease are to be considered "handicapped", this Court will essentially grant affirmative action rights to individuals currently barred from the U.S. Such a decision would create a contradiction in the law. The federal law would, on the one hand, exclude

aliens, students and tourists with contagious diseases, from entering this country, while on the other, require federal agencies and parties receiving federal dollars to take affirmative action to hire individuals with these same diseases.

II. THE RAMIFICATIONS OF A DECISION TO INCLUDE PERSONS WITH CONTAGIOUS DISEASES WITHIN THE PROTECTIONS OF THE REHABILITATION ACT WOULD BE FAR-REACHING AND HAVE CONSEQUENCES UNINTENDED BY CONGRESS.

A. Issues raised by the legislative history of the Rehabilitation Act apply to consideration of an individual with a contagious disease.

There are currently 229 diseases considered "contagious" by the Centers for Disease Control. Benenson, Abram S., CONTROL OF CONTAGIOUS DISEASES IN MAN, 14th Edition, 2nd Printing, 1985. Diseases in this category range from airborne diseases, such as tuberculosis to venereal diseases such as syphilus and AIDS. *Id.* A decision by this Court to include contagious diseases within the definition of "handicapped" for purposes of anti-discrimination protections under the law would reach countless victims of disease unintended by Congress.

In amending the Rehabilitation Act in 1978, Congress considered the far-reaching implications of extending the Act to include drug addicts and alcoholics. During a hearing before the House Subcommittee on Select Education of the Committee on Education and Labor, Congressman Henry Hyde questioned the wisdom of even this small expansion of the law. Oversight Hearings on the Rehabilitation Act of 1973. 95th Congress, 2d. Sess., 1978, at 502. Not only would this extension forbid recipients of federal funds "from unfairly excluding handicapped individuals, but it would also require positive steps to give handicapped citizens meaningful equality of

opportunity in employment health, education and social service programs." *Id.* at 502. Congressman Hyde then postulated the effects of the expansion: "Are schools which receive federal funds now mandated to seek such persons out for employment? Will the Federal Reserve System, Federal Deposit Insurance Corporation and the Treasury Department have its quotas, or goals if you prefer, of such employees? *Id.* at 502.

While Congressman Hyde was merely hypothesizing about extending the law to include drug abusers and alcoholics, expanding the law to include persons with contagious disease would pose even more serious questions of public policy. For example, in the case of AIDS, 64 million persons could fall within this expanded definition of "handicapped" within the next 3 years and therefore would be subject to the anti-discrimination protections in Section 504 of the Rehabilitation Act. M. Melbye, M.D., et al. *Long Term Seropositivity for Human T-Lymphotropic Virus Type III in Homosexual Men Without the Acquired Immunodeficiency Syndrome: Development of Immunologic and Clinical Abnormalities*, 104 ANNALS OF INTERNAL MEDICINE (April 1986). Although no hearings have been held on the consequences of an expansion of the law, commonsense should tell us that this interpretation could be seriously counterproductive to industry, government, education and the handicapped themselves.

Further conjecture by Congressman Hyde serves to illustrate the potential impact of an expanded definition:

> If an employer may not inquire of a prospective employee about his or her handicap . . ., nor even require a physical examination, how can an effective determination be made as to the applicant's ability to perform job-related functions? Blind interviews and hiring practices should be of great interest to insurance companies [dealing in] both liability and workmen's compensation carriers. I think we can predict a quantum leap in insurance premiums to be

reflected in the added costs being passed on to the consumer.

Id. at 503. These same issues are raised when one considers including an individual with a contagious disease in the definition of "handicapped."

The potential ramifications of this Court's decision are already being felt in a number of States in an albeit narrow context. The communicable disease, AIDS, has been the subject of state law and court decisions purporting to protect victims of AIDS as legally handicapped." [6] The fatal nature of the disease and, as yet, undiscovered routes of transmission pose a potential, though undefined, danger.[7] Because tuberculosis poses a well-established

[6] The Los Angeles City Council adopted an ordinance which prohibits discrimination against victims of AIDS. Merina, *Bradley Signs Landmark AIDS Measure*, THE LOS ANGELES TIMES at A1, col. 1, (August 17, 1985). The State of Wisconsin adopted an ordinance which bans discrimination against victims of AIDS. The Florida Commission on Human Relations ruled in January, 1986 that the Broward County Government illegally discriminated against a man with AIDS when it fired him. The Commission held that AIDS is a "physical handicap" and therefore AIDS victims are protected by Florida law prohibiting employment discrimination. Walter, D., *Florida Man Wins AIDS Discrimination Appeal*, THE ADVOCATE at 17, col. 1 (January 21, 1986); A Virginia patent draftsman with AIDS is suing the D.C. employer who fired him based on a Virginia law protecting disabled persons from discrimination. Engel, *Alexandria Firm Sued Over Firing AIDS Victim*, THE WASHINGTON POST at B1, col. b (February 14, 1986); A Virginia doctor is suing Fairfax City health clinic for discrimination based on a Virginia law which prohibits discrimination against the disabled. Specter, M., *Va. Doctor With AIDS Sues Clinic Over Firing*, THE WASHINGTON POST at D4, col. 1 (April 10, 1986).

[7] At present, approximately 14,000 persons have developed AIDS and it is expected that about two million people are now infected and will remain infectious until they die. In addition if the disease develops at the same rate, as is expected, the number infected will double every year. Robertson, A.D.J., *The Virulence of AIDS*, THE WALL STREET JOURNAL at 33, col. 1 (October 31, 1985). Thus in five years in the U.S. alone 448,000 people will have AIDS and

threat to public health, the case at bar poses an even more compelling case for excluding individuals with contagious disease from the Act's protection. *See* footnote 3.

B. This Unprecedented Expansion of the Law Should be the Subject of In-Depth Congressional Consideration.

Congress created this ambiguity in the law and careful exploration of legislative intent is needed to clarify it. The problems are complex and varied and need pervasive study before this Court mandates a solution which could be far worse than the problem. For this reason, Congressman Dannemeyer has introduced H.R. 5111, legislation which would exclude individuals with contagious disease from the definition of "handicapped" for purposes of the anti-discrimination and affirmative action provisions of the Rehabilitation Act.[8]

die within 2 to 3 years. 64 million people will be permanently infected within three years and will develop AIDS or some measureable defect. M. Melbye, M.D., et al. *Long Term Seropositivity for Human T-Lymphotropic Virus Type III in Homosexual Men Without Acquired Immunodeficiency Syndrome: Development of Immunologic and Clinical Abnormalities*, 104 ANNALS OF INTERNAL MEDICINE (April 1986). An expansion of "handicapped" to include contagious diseases would then include 64 million people within the anti-discrimination protections of The Rehabilitation Act. 29 U.S.C. 793, 794 (1973). In many cases, victims of contagious diseases, such as AIDS, syphilus and gonorrhea, contracted the disease through volitional acts whereas persons associated with traditional handicaps acquired their disabilities at birth or through subsequent causes through no fault of their own.

At present there are no known cases of transmission by saliva or air but there is a growing consensus among some doctors that AIDS may be passed by kissing, mouth-to-mouth resuscitation and sharing of glasses or toothbrushes. *See* McKeever, THE AIDS NEWSLETTER (June 1986).

[8] Congressman Dannemeyer introduced H.R. 5111, legislation to amend the definitional section of the Rehabilitation Act of 1973 to exclude persons with contagious diseases from the definition of "handicapped". The legislation was introduced on June 26, 1986 on

The Congress needs to give thoughtful and wide-ranging consideration to the needs of handicapped persons balanced against the realities of public safety and commonsense. Great numbers of truly handicapped individuals have suffered cruel and needless discrimination. The elimination of that discrimination and the attainment of equal opportunity employment based on reasonable accommodation is a worthy goal; disregard for public safety is not. This Court has an obligation to assess all ramifications of a decision to bring individuals with contagious disease under the protections of the Act. Ultimately, this Court must decide whether to permit Congress to clarify its intent on this crucial issue or to engage in judicial activism and thereby open the floodgates of litigation to countless claims of discrimination where none are merited.

CONCLUSION

For the foregoing reasons, amicus submits that this Court should strike down the Eleventh Circuit decision and find that victims of contagious disease are not within the protections of the Rehabilitation Act of 1973.

Respectfully submitted,

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behalf of himself and Congressmen Dornan, Siljander, Bentley, Smith and Craig. Section 706(7)(B) of the Rehabilitation Act was amended in 1978 to exclude drug addicts and alcoholics.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1277

THE SCHOOL BOARD OF NASSAU COUNTY, FLORIDA and CRAIG MARSH,
Petitioners,

v.

GENE H. ARLINE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC), with the consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioners.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondis-

[1] Their consents have been filed with the Clerk of the Court.

criminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Many of EEAC's members are the recipients of federal financial assistance and therefore are subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (hereinafter "Section 504" or "the Act"). In addition, most of EEAC's members are federal contractors subject to Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, which requires federal contractors to take affirmative action to employ and advance in employment qualified handicapped individuals. Accordingly, EEAC's members have a direct interest in the issues presented in this case; *i.e.*, whether the disease of infectious, contagious tuberculosis constitutes a handicap within the meaning of Section 504 and whether a person with infectious tuberculosis can be "otherwise qualified" for the job of elementary school teacher within the meaning of Section 504.

Because of its interest in issues arising under Section 504 of the Rehabilitation Act, EEAC has filed amicus curiae briefs with this Court in a number of cases construing that statute. *See, e.g., Alexander v. Choate*, 105 S.Ct. 712 (1985); *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624 (1984); *Uni-*

versity of Texas v. Camenisch, 451 U.S. 390 (1981); and *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

This case involves a challenge under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, to the dismissal from her job as an elementary school teacher of an individual who suffered from the disease of infectious tuberculosis.

Mrs. Gene Arline first contracted tuberculosis in 1957, after which the disease was in remission. In 1966, she was hired as an elementary school teacher in Nassau County, Florida. In 1977, she suffered a relapse of tuberculosis and in 1978 she suffered two additional relapses. After the first two relapses, she was suspended from her teaching duties and allowed to return to teaching after treatment. Following the third relapse, she was dismissed from her job.

After unsuccessfully contesting her dismissal in state administrative proceedings and in state court, Arline filed suit in federal court alleging that her dismissal violated Section 504 of the Rehabilitation Act. She contended in her suit that her susceptibility to tuberculosis made her a "handicapped individual" within the meaning of the Act and that her dismissal violated Section 504 because she was "otherwise qualified" for the job if given reasonable accommodation.

Following a non-jury trial, the district court, in an unreported opinion, found for the School Board. The court initially concluded that Arline was not a "handicapped individual" because Congress did not intend for infectious or contagious diseases to be covered within the definition of a "handicapped individual" (Petition for Writ of Certiorari, Appendix C at 2) (hereinafter "Pet. App."). The court further held that even if she were considered to be a "handicapped individual," she was not otherwise qualified for other non-elementary school positions because she was not certified to teach outside of elementary education (Pet. App. at C 2). Finally, the court concluded that the School Board had no obligation to offer her positions outside of elementary education because of its overrding duty to protect the public from persons with infectious or contagious diseases (Pet. App. at C 3).

The Eleventh Circuit, in an opinion reported at 772 F.2d 759, held that a person with tuberculosis "has a physical or mental impairment which substantially limits . . . major life activities," 29 U.S.C. § 706(7)(B) (1985), and thus falls within the meaning of a handicapped individual for purposes of Section 504 of the Rehabilitation Act. The court stated that neither the statute itself nor the regulations issued under it dictated that chronic contagious diseases should be excluded from the definition of "handicap." The court remanded the case to the lower court for a determination of whether Arline would be "otherwise qualified" if given "reasonable accommodation."

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the disease of infectious, contagious tuberculosis is a handicap within the meaning of the Rehabilitation Act of 1973. Neither the Rehabilitation Act itself, its legislative history, nor the regulations promulgated under the Act indicate that Congress intended an infectious, contagious disease such as tuberculosis to be a covered handicap.

The longstanding recognition by Congress and the Executive Branch of tuberculosis as a communicable disease of such seriousness that individuals afflicted with it may be subjected to apprehension, detention or isolation clearly demonstrates that Congress could not have intended such a disease to be protected as a handicap. *See, e.g.*, 42 U.S.C. § 264(b) (1982). In addition, it should be presumed that Congress was aware of the numerous enactments of state and local governments designed to combat the spread of communicable diseases such as tuberculosis. Given this prior treatment of tuberculosis by Congress and by state and local governments, there is no reason to believe that Congress intended to cover as a handicap an infectious, contagious disease that poses a direct threat to the health and safety of others.

The respondent in this case was not dismissed because she was physically or mentally impaired in any way that affected her ability to perform her job—rather, she was terminated out of concern that she would infect others with whom she might come in contact. Under these circumstances, it cannot be said that her disease "substantially limits" a "major life activity" within the meaning of Section 504.

Even if tuberculosis is deemed to be a handicap, the School Board acted lawfully in dismissing the respondent based on the fact that she was not "otherwise qualified" for the position of elementary school teacher because she could not perform the essential functions of the job without endangering the health and safety of others. The School Board in this case was entitled to treat the absence of tuberculosis as a qualification for employment—a qualification which the respondent did not possess.

The School Board met any obligation of "reasonable accommodation" of the respondent's disease by allowing her temporarily to be suspended from her teaching duties following her first two relapses of tuberculosis and by dismissing her only following a third relapse. The School Board was under no legal obligation to attempt to accommodate the respondent by offering her jobs other than the job which she held at the time of her dismissal.

ARGUMENT

I. THE DISEASE OF INFECTIOUS, CONTAGIOUS TUBERCULOSIS DOES NOT CONSTITUTE A HANDICAP WITHIN THE MEANING OF THE REHABILITATION ACT.

The lower court erred in holding that the disease of infectious, contagious tuberculosis constitutes a "handicap" within the meaning of the Rehabilitation Act of 1973, as amended (hereinafter "the Act"). The lower court decision cited no specific indications in the language of the statute, the regulations promulgated under the statute, or in the legislative history that Congress intended such diseases to be covered as a handicap under the Act. In fact, there are strong indicia in a number of other laws that clearly

demonstrate the unlikelihood that Congress intended for such diseases to be covered. Because the inclusion of such infectious, contagious diseases would expand the definition of a handicap beyond that which Congress intended, the decision of the lower court should be reversed and this Court should hold that tuberculosis is not a handicap within the meaning of the Rehabilitation Act.

A. Neither the Rehabilitation Act Itself, Its Legislative History, Nor the Regulations Promulgated Under The Act Indicate That Congress Intended An Infectious, Contagious Disease To Be A Covered Handicap Under Section 504.

Section 504 of the Rehabilitation Act provides that "no otherwise qualified handicapped individual" should be subjected to discrimination under any program or activity receiving federal financial assistance. 29 U.S.C. § 794 (1985).[2] Section 706(7)(B) of the Rehabilitation Act, 29 U.S.C. § 706(7)(B), defines a "handicapped individual" as any individual who:

> (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

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[2] Section 504 reads in relevant part as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Thus, the language of the statute itself does not expressly include infectious, contagious diseases within the definition of a "handicapped individual." As noted below, court decisions construing the definition of handicap have excluded from coverage diseases which pose a threat to the health or safety of others, which are transitory, or which do not impair a "major life activity."

Regulations issued by the Department of Health and Human Services, 45 C.F.R. § 84.3(j)(2) (1983), provide in relevant part that:

> (i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems; neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
>
> (ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, seeing, hearing, speaking, breathing, learning, and working.

The regulations also make no mention of any specific diseases and thus offer no specific guidance as to whether tuberculosis is a covered "physical or mental impairment" within the meaning of the Act.

The HHS analysis accompanying the regulations states that the term "physical or mental impairment" includes "such diseases and conditions as orthopedic,

visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness and . . . drug addiction and alcoholism." 45 C.F.R. Pt. 84, App. A at 297 (1983). It is significant that the analysis includes neither tuberculosis nor any other disease or condition that constitutes a direct threat to the health or safety of others.

In the absence of any clear indication from either the statute or the regulations that infectious, contagious diseases such as tuberculosis were intended to be covered, it was incumbent upon the plaintiff below and the court of appeals to adduce evidence from the legislative history of the Act that clearly indicates that Congress intended such diseases to be covered as a handicap. *See Allen v. State Board of Elections*, 393 U.S. 544, 570 (1969). This the plaintiff below and the lower court simply failed to do.

In its recent decision in *Bowen v. American Hospital Assn.*, 54 U.S.L.W. 4579 (U.S. June 9, 1986), the Court emphasized the importance of looking to the legislative history under the Rehabilitation Act in determining whether Congress intended certain actions to be covered under the Act. The Court noted in that case that:

> The legislative history of the Rehabilitation Act does not support the notion that Congress intended intervention by federal officials into treatment decisions traditionally left by state law to concerned parents and the attending physicians or, in exceptional cases, to state agencies charged with protecting the welfare of the infant. As the Court of Appeals noted, there is nothing in the legislative history that even remotely sug-

gests that Congress contemplated the possibility that "section 504 could or would be applied to treatment decisions, involving defective newborn infants." 729 F.2d 144, 159 (1984). 54 U.S.L.W. at 4588 n.33.

Similarly, in the instant case the plaintiff and the lower court cited *no* evidence that Congress ever contemplated that infectious, contagious diseases such as tuberculosis would be included as a handicap under the Act.[3] While there was nothing from the legislative history cited by the lower court to support its conclusion that tuberculosis was a handicap, the legislative history specifically states that the definition of handicap was not intended to be "totally open ended." S. Rep. No. 1297, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6413.

In *Alexander v. Choate*, 105 S.Ct. 712, 720 (1985), this Court noted that "[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives *and the desire to keep § 504 within manageable bounds*." (Emphasis added). The lower court cited neither statutory language, legislative history, nor regulations that provide any direct evidence of Congressional intent to include infectious, contagious diseases such as tuberculosis within the definition of handicap under the Act.

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[3] The absence of any support in the legislative history for the inclusion of an infectious, contagious disease within the meaning of "handicap" is particularly significant where "the situation in question is dramatically different in kind, not just in degree, from the applications of section 504 discussed in the legislative history." *United States v. University Hosp., State University of New York*, 729 F.2d 144, 159-60 (2d Cir. 1984).

The court of appeals, in holding that tuberculosis was a covered handicap, reasoned that the disease constitutes a physical or mental impairment which substantially limits major life activities "since the disease can significantly impair respiratory functions as well as other major body systems." 772 F.2d at 764. The lower court stated that tuberculosis fits within what it believed to be the literal definitions contained in the statutes and the regulations, and noted that "we would be hard pressed to find an exemption without further legislative direction." *Id.* The court of appeals' decision that virtually any condition or disease that fits within the literal definition of handicap contained in the statute and regulations is covered by the Act would appear to be at serious odds with the admonition of Congress that the definition was not intended to be "totally open ended." Moreover, by holding that "there is no such legislative direction," *id.*, the lower court ignored a substantial body of laws passed by Congress and orders issued by the Executive Branch which clearly indicate that Congress could not have intended that an infectious, contagious disease such as tuberculosis would be considered to be a handicap under the Rehabilitation Act.

B. Clear Expressions By Congress And The Executive Branch Prior To The Enactment Of The Rehabilitation Act Demonstrate That Congress Could Not Have Intended Infectious, Contagious Diseases To Be Covered By The Act.

It is extremely unlikely that Congress intended the Rehabilitation Act to be interpreted in a vacuum that disregarded other legislation that deals directly with tuberculosis and other infectious diseases and that predated the Rehabilitation Act by several dec-

ades. For example, 42 U.S.C. § 264 authorizes the Secretary of Health and Human Services (HHS) to issue regulations to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States or from one state to another. 42 U.S.C. § 264(a) (1982). Congress has authorized the Secretary to issue regulations that provide for the "apprehension, detention, or conditional release" of persons who have contracted certain "communicable diseases" specified in Executive Orders of the President issued upon the recommendation of the National Advisory Health Council and the Assistant Secretary for Health of HHS. 42 U.S.C. § 264(b) (1982).

A series of Presidential Executive Orders consistently has designated tuberculosis as such a communicable disease and those persons with tuberculosis may be subject to "apprehenion, detention, or conditional release" pursuant to HHS regulations.[4] *See* Exec. Order No. 9708, 11 Fed. Reg. 3241 (March 28, 1946); Exec. Order No. 10,532, 19 Fed. Reg. 3209 (June 2, 1954); Exec. Order No. 11,070, 27 Fed. Reg. 12,393 (December 14, 1962); Exec. Order No. 12,452, 48 Fed. Reg. 56,927 (December 22, 1983). Other statutes enacted prior to the Rehabilitation Act treat tuberculosis in a similar fashion. *See, e.g.*, 8

[4] HHS regulations, in accordance with the Executive Orders, designate "tuberculosis" as a communicable disease that may subject the afflicted person to apprehension, detention or conditional release. *See* 42 C.F.R. § 1240.54 (1985); *see also* 42 C.F.R. § 71.32 (1985) (providing for the detention, isolation, or surveillance of persons arriving in the United States whom the Director of the Center for Disease Control has reason to believe are infected with or have been exposed to tuberculosis).

U.S.C. § 1285 (1970) (making it unlawful for any vessel or aircraft carrying passengers entering the United States to have employed on board on arrival any alien afflicted with tuberculosis).

Thus, the longstanding recognition by Congress and the Executive branch of tuberculosis as a communicable disease that could subject afflicted individuals to apprehension, detention or isolation conclusively demonstrates that Congress could *not* have intended such a disease to be protected as a handicap under the Rehabilitation Act. In a similar context, the Second Circuit in *United States v. University Hosp., State University of New York*, 729 F.2d 144, relied heavily on Congressional enactments prior to the Rehabilitation Act in determining whether Congress intended medical treatment decisions to be covered by the Act. After noting that prior to the passage of the Rehabilitation Act, Congress had passed a number of measures limiting federal involvement in medical treatment decisions, the court concluded that:

> In view of this consistent congressional policy against the involvement of federal personnel in medical treatment decisions, we cannot presume that Congress intended to repeal its earlier announcements in the absence of clear evidence of congressional intent to do so (citation omitted). As has already been seen there is no such clear expression of congressional intent in either the language or legislative history of section 504. *Id.* at 160.

See also Bowen v. American Hospital Assn., 54 U.S.L.W. at 4584.

Similarly, where Congress and the Executive Branch consistently and historically have considered

tuberculosis to be so serious a communicable disease that they have provided for the apprehension, detention and isolation of persons afflicted with the disease, it defies logic to argue that Congress would have protected such persons under the Rehabilitation Act from being removed from contact with public school children, or from co-workers generally. The inclusion of such communicable diseases within the meaning of a "handicap" under Section 504 would dictate that virtually *any* disease, no matter how dangerous to others, would be similarly covered. It simply is inconceivable that Congress could have intended such a result.[5]

In addition to these clear expressions by Congress prior to the passage of the Act of the severe health

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[5] It is clear that, contrary to the lower court's decision, "section 504 was never intended by Congress to be applied blindly and without any consideration of the burdens and intrusions that might result." *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395, 402 (D.D.C. 1983). For example, a decision by this Court holding that an infectious, contagious disease such as tuberculosis is a handicap under the Rehabilitation Act also could subject employers to the possibility of damage suits based on the emerging theories of negligent hiring or negligent retention of employees. *See, e.g., Doe v. New York University*, 666 F.2d 761, 777 (2nd Cir. 1981); *Henley v. Prince George's County*, 503 A.2d 1333 (Md. 1986); *Abbott v. Payne*, 457 So.2d 1156 (Fla. App. 4 Dist. 1984); *Pruitt v. Pavelin*, 685 P.2d 1347 (Ariz. App. 1984). Under such emerging theories, it is not unlikely that an employer who was required to retain an employee with a contagious disease such as tuberculosis might be sued by employees who were exposed to the disease in the workplace. Given this possibility, it is unlikely that such diseases should receive protection under the Rehabilitation Act.

threat that tuberculosis presents, it should be presumed that Congress also was aware that state and local governments had enacted numerous health codes designed to contain the spread of communicable diseases such as tuberculosis. *See, e.g.*, Va. Code § 32.1-51 (1985); Fla. Stat. Ann. § 29-392.26 (providing for compulsory isolation, quarantine and treatment of persons with tuberculosis).

Moreover, state law in Florida requires the School Board to provide for the welfare of children attending public schools, including their health and safety. Fla. Stat. Ann. § 230.33(b) (Supp. 1980). Citing this obligation of the School Board under state law, a state court in Florida rejected Mrs. Arline's challenge to her dismissal. In doing so, the court noted that "[a] teacher with infectious tuberculosis is a totally unacceptable health risk to the highly susceptible children she teaches." *School Bd. of Nassau County v. Arline*, 408 So.2d 706, 708 (Fla. Dist. Ct. App. 1982).

The inclusion of infectious, contagious diseases such as tuberculosis within the definition of "handicap" under the Rehabilitation Act could undercut significantly the ability of state and local governments to protect the health and safety of their citizens. In the absence of some clear indication from Congress of an intent to allow such an interference with traditional state areas of regulation, this Court should be particularly reluctant to do so by decision. *See e.g., Bowen*, 54 U.S.L.W. at 4588-89, *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 281-82 (1972); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 152 (1944).

C. The Decision Below Extending Section 504 To A Condition That Constitutes A Direct Threat To The Health Or Safety Of Others Is Not Supported By Other Court Decisions Or Agency Interpretations Of Section 504.

Prior to the instant court of appeals' decision, the courts had taken care to limit the definition of a handicapped individual to those conditions which fall easily within a common understanding of handicap. *See, e.g., Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (epilepsy); *Strathie v. Department of Transp.*, 716 F.2d 227 (3d Cir. 1983) (hearing impairment); *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372 (10th Cir. 1981) (multiple sclerosis); *Simon v. St. Louis County, Mo.*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982) (paraplegia); *Coleman v. Darden*, 595 F.2d 533 (10th Cir.), *cert. denied*, 444 U.S. 927 (1979) (blindness). The handicaps recognized in these cases have been ones in which physical or mental limitations did *not* pose an immediate and direct threat to the health and safety of co-workers and other persons having contact with the handicapped individual.[6] There is

[6] A number of decisions have implied or held that an illness that is "transitory" or not "stabilized" is not a handicap within the meaning of the Act. *See, e.g., Pushkin v. Regents of University of Colorado*, 658 F.2d at 1388 (a handicapped person is "stabilized" in that the defect is predictable and can be accounted for, whereas an ill person is not stabilized); *Stevens v. Stubbs*, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983) ("transitory" illnesses not a handicap); *Doss v. General Motors Corp.*, 25 FEP Cases 419, 421 (C.D. Ill. 1980) (chronic infection in ears an illness and not a handicap under Illinois statute). The distinction recognized in these cases between an "illness" and a "handicap" lends support to the conclusion that tuberculosis should *not* be considered to be a handicap

no reason to believe that Congress meant to equate such non-threatening physical or mental impairments with an infectious, contagious disease which poses a direct threat to the health and safety of elementary school children as well as other persons employed in the school system. In the absence of a clear indication that such diseases were intended to be viewed as handicaps, this Court should not depart from the common view of handicapping conditions.[7]

D. Even If Respondent's Tuberculosis Were An "Impairment" Within The Meaning Of Section 504, It Did Not "Substantially Limit" A "Major Life Activity."

Even if tuberculosis were to be considered an "impairment" within the meaning of Section 504, it is

under the Rehabilitation Act. *See also de la Torres v. Bolger*, 781 F.2d 1134, 1138 (5th Cir. 1986) (being left-handed is a physical characteristic and not an "impairment" within the meaning of the Act).

[7] The Department of Justice, which has responsibility for coordinating the implementation and enforcement of Section 504 by executive agencies, *see* Exec. Order No. 12,250 § 1-201(c), 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 note, has concluded that "section 504 does not reach discrimination based on communicability." Memorandum for Ronald E. Robertson, General Counsel, Department of Health and Human Services, signed by Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 39, *reprinted in* 122 Daily Labor Report at D-1 (June 25, 1986). In criticizing the lower court decision in this case, the memorandum correctly noted that Mrs. Arline "was discharged because of her ability to transmit the disease," *id.* at 27 n.70, and such "communicability is not a handicap under section 504." *Id.* The Department of Justice opinion also contains a detailed discussion of federal, state and local quarantine laws which render it unlikely that Congress would have included communicable diseases within the federal definition of a handicap.

doubtful that such a disease "substantially limits" a "major life activity" within the meaning of that Section. It is undisputed that Mrs. Arline was able, both physically and mentally, to perform the duties of elementary school teacher when she was dismissed.[8] Thus, the reason she was dismissed was not because she was physically or mentally impaired in any way that affected her ability to perform the job. Rather, the reason she was terminated was because of the concern that she would infect others with whom she might come in contact. Under these circumstances, it cannot be said that she was substantially limited in a major life activity within the meaning of Section 504 and its accompanying regulations. *See, e.g., Jasany v. United States Postal Service*, 755 F.2d 1244, 1250 (6th Cir. 1985) (individual with "crossed eyes" not handicapped within the meaning of the Act); *School Dist. of Philadelphia v. Friedman*, 40 FEP Cases 896, 898 (Pa. Comm. Ct. 1986) (chronic lateness not a handicap under Pennsylvania statute because it did not limit a major life activity).

II. THE RESPONDENT WAS LAWFULLY DISCHARGED BECAUSE SHE WAS NOT OTHERWISE QUALIFIED WITHIN THE MEANING OF THE REHABILITATION ACT.

In the event the Court finds that tuberculosis is a covered handicap under the Act, the lower court decision should be reversed because Mrs. Arline was not

[8] Neither the arguments below nor the opinion of the court of appeals was based on the fact that the performance of her teaching job by Mrs. Arline in any way caused her to experience distress in breathing or that the "major life activity" of "breathing" was substantially impaired *as it related to the performance of the job in question. See* 45 C.F.R. § 84.3(j)(2)(ii).

"otherwise qualified" within the meaning of the Rehabilitation Act. The undisputed medical evidence in this case indicated that Mrs. Arline was not "otherwise qualified" for and properly was removed from her position as an elementary school teacher because of the threat that her condition presented to the health of the children with whom she would come in contact. The School Board made substantial attempts to accommodate her in her elementary school teaching position and was under no legal duty to accommodate Mrs. Arline's illness further by offering her other positions.

A. Because Of The Danger Which The Condition Presents To The Health And Safety Of Others, A Person With Tuberculosis Is Not Otherwise Qualified To Be An Elementary School Teacher.

Section 504 prohibits discrimination only against an "otherwise qualified handicapped individual." In *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979), this Court defined an "otherwise qualified" person as "one who is able to meet all of a program's requirements in spite of his handicap." In *Davis*, this Court noted that a recipient of federal funding is *not* required to make "major adjustments" in its programs or "to lower or to effect substantial modifications of standards to accommodate a handicapped person." *Id.* at 413. Of importance for this case, the Court also noted that the program in issue in *Davis* sought "to ensure that no graduate will pose a danger to the public in any professional role in which he or she might be cast," *id.* at 413 n.12, and that "nothing in the Act requires an educational institution to lower its standards." *Id.*

In addition to *Davis*, numerous other cases have recognized that employers may and should take into

account the health and safety of others in determining whether a person is an "otherwise qualified handicapped individual" under the Act. For example, in *Prewitt v. United States Postal Service*, 662 F.2d 292, 310 (5th Cir. 1981), the Fifth Circuit held that:

> The ultimate test is whether, with or without reasonable accommodation, a handicapped individual who meets all employment criteria except for the challenged discriminatory criterion "can perform the essential functions of the position in question *without endangering the health and safety of the individuals or others.*" 28 C.F.R. § 1613.702(f) (emphasis added).[9]

See also Gardner v. Morris, 752 F.2d 1271, 1284 (8th Cir. 1985); *Stutts v. Freeman*, 694 F.2d 666, 669 n.3 (11th Cir. 1983).

Similarly, in *Mantolete v. Bolger*, 767 F.2d at 1423, the Ninth Circuit has stated that a handicapped

[9] The EEOC regulations interpreting "qualified handicapped person" expressly state that a handicapped person is one "who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others." 28 C.F.R. § 1613.702(f) (1985). Neither the HHS regulations, 45 C.F.R. § 84.3(k) (1983), nor the Department of Justice regulations, 41 C.F.R. § 41.32 (1981), expressly include the health and safety factor contained in the EEOC regulations. But, as noted in footnote 7, the Department of Justice's recent opinion letter to HHS expressly interprets the statute as incorporating those safety concerns. Therefore, whether it is expressly noted, as in the EEOC regulations, or contained by implication, as in the HHS and DOJ regulations, it is clear that the health and safety factor necessarily must be included in any analysis of the requirements for coverage as an "otherwise qualified" or as a "qualified handicapped" individual under the Act.

individual must be "presently qualified to perform the essential requirements of the job *without a reasonable probability of substantial injury to the applicant or others.*" (emphasis added). Other courts also have focused on the safety factor in determining whether an individual is otherwise qualified under the Act. *See, e.g., Doe v. Region 13 Mental Health Mental Retardation Comm'n*, 704 F.2d 1402, 1412 (5th Cir. 1983) ("where there is uncontroverted evidence of a chronic, deteriorating situation which is reasonably interpreted to pose a threat to the patients with whom the employee must work, no violation of Section 504 could reasonably be found"); *Doe v. New York University*, 666 F.2d at 777 ("any appreciable risk" could properly be taken into account); *McCleod v. City of Detroit*, 39 FEP Cases 225, 228 (E.D. Mich. 1985); *Bento v. I.T.O. Corp. of Rhode Island*, 599 F. Supp. 731, 744 (D.R.I. 1984) ("an employer may consider his employee's disability as it may affect the safety and welfare of other employees"); *Swann v. Walters*, 620 F. Supp. 741, 747 (D.D.C. 1984).

This Court also has recognized the importance of safety concerns in evaluating claims under other statutes. *See, e.g., Western Air Lines v. Criswell*, 105 S.Ct. 2743, 2754 (1985) ("The uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to err on the side of caution in a close case"); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 581 n.20 (1979).

Congress itself has excluded from the definition of a "handicapped individual" those persons whose current use of alcohol or drugs would make their employment "a direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B) (1985). In addi-

tion, it has been recognized that "[i]t would be unreasonable to infer that Congress intended to force institutions to accept or readmit persons who pose a significant risk of harm to themselves or others." *Doe v. New York University*, 666 F.2d at 777. There is no reason to think that Congress would have intended any different result where the threat to others was the possibility of contracting an infectious, contagious disease such as tuberculosis.

Numerous courts have recognized the deference under Section 504 which the decisions of the recipients of federal funding must be accorded. For example, in *Doe v. Region 13 Mental Health Mental Retardation Comm'n*, 704 F.2d at 1410, the Fifth Circuit correctly read this Court's decision in *Davis* as supporting "a reasonable deference to the decisions made by administrators of federally funded programs so long as no evidence is presented of discriminatory intent with regard to the handicapped person." Similarly in *Doe v. New York University*, 666 F.2d at 776, the Second Circuit noted that "considerable judicial deference must be paid to the evaluation made by the institution itself, absent proof that its standards and its applictaion of them serve no purpose other than to deny an education to handicapped persons." *See also Strathie v. Department of Transp.*, 716 F.2d at 231. Given the School Board's role in ensuring the health and safety of its students and employees and the express requirements in this regard contained in the Florida Statutes, see above, page 15, this deference is particularly appropriate in this case.[10]

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[10] In determining whether Mrs. Arline was "otherwise qualified" to continue teaching, this Court should look to whether there was a "substantial, reasonable basis" for the decision to dismiss her. *Doe v. Region 13*, 704 F.2d at 1410, 1412; *Coleman v. Darden*, 595 F.2d at 540 (employment decision was "rationally based"); *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977) ("substantial justification" test); *Bento v. I.T.O. Corp. of Rhode Island*, 599 F. Supp. at 744 ("If the employer reasonably believes that the employee is unable adequately to perform the work and refuses to hire him on that basis, the federal law will not have been transgressed").

The School Board's conclusions were supported amply by the record. Mrs. Arline was dismissed from her job as an elementary school teacher after her third relapse of tuberculosis within a two year period. The physician who testified in the district court as an expert recommended, prior to Mrs. Arline's dismissal, that she not continue to teach elementary school students (J.A. at 13, 15). The reason for her recommendation was that "small children are considered highly susceptible to tuberculosis and because the pattern of relapse suggested that there might be a possibility of further relapses" (J.A. at 13.)[11] She also testified that while small children were the most susceptible to tuberculosis, there is susceptibility in all persons, whether young or old (J.A. at 16, 37).

The physician acknowledged that prior to Mrs. Arline's dismissal, she was worried that Mrs. Arline might continue to have positive cultures for tuberculosis or relapses (J.A. at 30). She was not able to say at trial that Mrs. Arline would not have further relapses (J.A. at 31), and she testified that she was not aware of any person who had had multiple relapses of tuberculosis who was teaching in a public school (J.A. at 20). Finally, the physician acknowleged that because of a lag time in receiving tuber-

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[11] She testified that tuberculosis could be passed on to others by exhaling, respiration, coughing, sneezing or breathing (J.A. at 23).

culosis test results, a person with active tuberculosis might not be detected for a substantial period of time (J.A. at 24-25).

After assessing the danger which Mrs. Arline's condition posed to the health, safety and welfare of the school system, its students and employees, the School Board made the decision to terminate her employment (J.A. at 62-63; 81). Given the seriousness of her illness and the School Board's duty to protect the health of its students and employees, it simply cannot be said that this decision to make its concerns for health and safety a requirement for the job violated Section 504. Under these circumstances, the School Board was entitled to treat the absence of tuberculosis as a qualification for employment which Mrs. Arline was unable to meet.

B. The School Board Made Reasonable Attempts To Accommodate Respondent's Condition In The Job She Held And Was Not Required To Offer Her Other, Different Jobs.

As noted above, in *Davis*, 442 U.S. at 410, 412-413, this Court held that a recipient of federal funding is not required to make "extensive modifications" or to effect "major adjustments" to its programs to accommodate a handicapped person. In *Alexander v. Choate*, 105 S.Ct. at 721, the Court further explained that *Davis* dictated that "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *See also id.* at n.20.[12] Regardless of the precise contours of the

[12] The HHS regulations provide that a "qualified handicapped person" is "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." 45 C.F.R. § 84.3(k)(1) (1985).

"reasonable accommodation" obligations under Section 504, it is clear that the School Board did everything that it reasonably could have done to accommodate Mrs. Arline and that she still was not qualified to teach in an elementary school setting.

Following her first two relapses of tuberculosis in 1977 and 1978, Mrs. Arline was temporarily suspended from her teaching duties and was permitted to return to teaching after treatment of her condition (J.A. at 50, 81). Thus, it is clear that the School Board made substantial attempts to accommodate Mrs. Arline's condition by allowing her temporarily to be suspended from her teaching duties until she was treated successfully. It was only after a third relapse and the recommendation of a state specialist in tuberculosis that she not be allowed to teach elementary school students that she ultimately was dismissed. Under these circumstances, it is clear that the attempts of the School Board to make a "reasonable accommodation" to Mrs. Arline's illness satisfied the requirements of Section 504.

The HHS regulations on "reasonable accommodation" provide that:

> A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. 45 C.F.R. § 84.12(a).

Because of the significant health risks to others presented by Mrs. Arline's condition, it is clear that any accommodation which required the School Board to

retain her in its employ would have constituted an "undue hardship" within the meaning of the regulations.

The order of this Court granting the petition for a writ of certiorari requested briefing and argument on the question of "[w]hether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being 'otherwise qualified' *for the job of elementary school teacher* within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794?" (Emphasis added.) The respondent virtually concedes, as she must, that she was not "otherwise qualified" for the job of elementary school teacher. The respondent has argued, however, that she should have been afforded some other position where she would come in contact with less susceptible persons. Even if the issue of accommodating her by offering her some other job *outside the elementary school setting* is properly before the Court, it is clear that the School Board did not act unlawfully in failing to offer her such a position.

While the duty of "reasonable accommodation" may require a recipient of federal funding to make certain accommodations in the job held or applied for, there is *no* duty under Section 504 to accommodate by offering *other, different* jobs to the employee. Any such requirement under Section 504 would be contrary to this Court's admonition in *Davis* that a grantee is not required to make "fundamental" or "substantial" modifications to accommodate a handicap. Such an open-ended requirement to seek out and offer jobs which the handicapped person has not held or applied for could not have been contemplated by Congress or by this Court's decision in *Davis*.

Decisions of the lower courts have recognized that the duty to accommodate extends only to the position held or sought by the handicapped individual. For example, in *Carty v. Carlin*, 623 F. Supp. 1181 (D. Md. 1985), the court noted that:

> [T]he duty to reasonably accommodate only contemplates accommodation of a qualified handicapped employee's present position. It does not include a requirement to reassign or transfer an employee to another position. *Id.* at 1188.

See also Gardner v. Morris, 752 F.2d at 1281; *Dexler v. Carlin*, 40 FEP Cases 633, 639 (D. Conn. 1986) ("[T]he requirement that an employer make reasonable accommodation to the known handicaps of job applicants does not mandate that an employer consider handicapped applicants for jobs for which they have not applied"); *Alderson v. Postmaster General of the United States*, 598 F. Supp. 49, 55 (W.D. Okla. 1984). Thus, the School Board did not violate any obligation under Section 504 by failing to offer Mrs. Arline positions other than the one she occupied at the time of her dismissal.[13]

In the instant case, Mrs. Arline did not apply for or otherwise express interest in other jobs at the time of her dismissal. In fact, as the district court observed, pet. app. at C-2, Mrs. Arline was not certified to teach in other than elementary education. Where an employee does not possess a basic criterion, such as a teaching certificate, required for a job, it

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[13] Of course, employers are free to offer such other positions *voluntarily* to a handicapped individual, but they are under no legal obligation to do so. *Cf. United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

cannot be said that the denial of such a job was "solely because of his handicap" within the meaning of Section 504. *See, e.g., Swann v. Walters*, 620 F. Supp. at 747 (plaintiff not "otherwise qualified" where he was unable to hold a security clearance); *cf. Guerriero v. Schultz*, 557 F. Supp. 511, 514 (D.D.C. 1983) (plaintiff not "otherwise qualified" where his condition prevents him from accepting a position overseas).

Accordingly, it is clear that Mrs. Arline was not "otherwise qualified" for the position of elementary school teacher because she could not perform the essential functions of that job without endangering the health and safety of others. The School Board met any duty of "reasonable accommodation" which it might have had by allowing her to take a leave of absence until her disease could be treated, and was under no legal obligation to offer her other jobs that she had not applied for and for which she did not possess the necessary teaching certification. Under these circumstances, it simply cannot be said that the School Board violated Section 504.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals holding that tuberculosis is a handicap within the meaning of Section 504 should be reversed. Even if tuberculosis does constitute a handicap under that statute, the lower court decision should be reversed because the respondent was not "otherwise qualified" for the position of elementary school teacher because of the direct threat to the health and safety of others which her condition presented.

Respectfully submitted,

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No. 85-1277

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA and CRAIG MARSH, Individually and as Superintendent of Schools of Nassau County, Florida,
Petitioners,

v.

GENE H. ARLINE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the contagious, infectious disease of tuberculosis constitutes a "handicap" within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

2. Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

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IN THE

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SCHOOL BOARD OF NASSAU COUNTY, FLORIDA and CRAIG MARSH, Individually and as Superintendent of Schools of Nassau County, Florida,
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Amicus American Medical Association ("AMA") is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, its membership exceeds 280,000 physicians and medical students nationwide.

The AMA's specific interest in this case is to assist this Court in establishing an appropriate framework for

analyzing claims of employment discrimination brought under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, by those suffering from communicable diseases. A proper framework will help lower courts fairly resolve the fundamental tension between legitimate concerns of the medical profession posed by such cases—the need to protect persons handicapped by disease from irrational decisions stemming from prejudice, ignorance or fear and the equally important need to protect innocent third persons from the risk of substantial harm created by those afflicted with communicable diseases. The key to resolving that tension is to ensure that employment decisions by federal fund recipients are reasonably related to reasonable, individualized medical judgments regarding the handicapping disease and the risk to third parties.[1]

MEDICAL BACKGROUND

A. Communicable Diseases in the United States

Each year, millions of Americans contract communicable diseases.[2] See Centers for Disease Control, Morbidity and Mortality Weekly Report, January 3, 1986 at 782 (year-end figures for select diseases). More than 200 different communicable diseases have been identified, ranging from acquired immune deficiency syndrome (AIDS) to zygomycosis (a fungal infection) and including chickenpox, the common cold, gonorrhea, hepatitis, herpes, influenza, malaria, meningitis, mononucleosis, pertussis, plague, pneumonia, poliomyelitis, syphilis, tetanus and, in the case at hand, tuberculosis. See *Control of Communicable Diseases in Man* (A. Benenson ed., 14th ed., 1985).

[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Copies of those letters have been filed with the Clerk of the Court.

[2] The words "communicable," "contagious" and "infectious" are sometimes used interchangeably. Depending on their context, however, their meaning can vary. "Communicable disease" or "infectious disease" usually refers to a disease that is capable of being transmitted to others at some time, although a person with a communicable or infectious disease may not currently be capable of transmitting it. When someone is currently capable of transmitting a disease to others, he or she is referred to as being "contagious," "infectious" or (less frequently) "communicable." Dorland's Illustrated Medical Dictionary at 293, 301, 664 (26th ed. 1981).

The effect of the symptoms of these communicable diseases on afflicted persons range from death to paralysis to runny noses. In some cases, a person with the communicable disease may have no symptoms at all.

Communicable diseases are caused by viruses, bacteria, fungi and parasites. The mode of transmission varies widely. Communicable diseases may be transmitted directly from human to human by touching, biting, kissing, coughing, sneezing or sexual intercourse. Others are indirectly transmitted by contaminated object or medium, such as handkerchiefs, bedding, utensils or blood transfusions. Still others are transmitted from animal to human by, *inter alia*, insect stings or animal bites. *Control of Communicable Diseases in Man, supra*, at 457-58.

A person who "catches" the disease will, of course, ordinarily exhibit the symptoms associated with that disease. The risk that a disease will be transmitted and the risk that, if transmitted, the disease will cause serious harm vary greatly. The American Public Health Association has divided communicable diseases into five classes (with several subclasses) based on the relative need for an investigation and the need to start control measures to protect the public health. They range from Class 1 diseases, which must be immediately reported to health authorities, such as plague, polio and influenza, to Class 5 diseases, for which an official report is not ordinarily required, such as the common cold. *Control of Communicable Diseases in Man, supra*, at xxii-xxiv. Tuberculosis is classified as a Class 2B disease, as are gonorrhea, leprosy and measles; cases are to be reported to local health authorities by the most practicable means and

those reports should be forwarded to higher health authorities weekly by mail. *Id.* at 414, xxiii.

B. Tuberculosis

In the past, tuberculosis was known as the "white plague" because it killed so many people. Glassroth, Robins & Snider, *Tuberculosis in the 1980s*, 302 New Eng. J. Med. 1441 (1980). Today, medicine can treat, cure and even prevent the disease. Nonetheless, in 1978, 28,521 cases of tuberculosis were reported in the United States, 2,914 of which were fatal. In 1982, the most recent year for which statistics are available, 25,520 cases were reported nationwide, resulting in 1,807 deaths. U.S. Department of Health and Human Services, *Tuberculosis in the United States, 1982* at 2 (1985). Deaths generally occur today because the disease is diagnosed late in its development, or because victims have other illnesses or medical problems or do not regularly take appropriate medication. Davis, Carpenter, McAllister, Matthew, Bush & Ognibene, *Tuberculosis: Cause of Death in Antibiotic Era*, 88 Chest 726 (1985).

The infectious agent in tuberculosis, *Mycobacterium tuberculosis* (tubercle bacillus), is carried on airborne droplets. These droplets are produced when persons with pulmonary tuberculosis in or around their lungs sneeze, cough, speak or sing. Once released, the particles disperse throughout a room, suspended in the air. If a droplet is inhaled, the bacteria may implant in the respiratory tract. There, the bacteria may multiply and spread through the lymphatic system and the bloodstream. American Thoracic Society, *Diagnostic Standards and Classification of Tuberculosis and Other Mycobacterial Diseases (14th Edition)*, 123 Am. Rev. Respiratory Disease 343, 344 (1981) (hereafter *"Diagnostic Standards"*); *Harrison's Principles of Internal Medicine*, 1020 (10th ed. 1983); *Merck Manual of Diagnosis and Therapy* 127 (14th ed. 1982).

The newly infected host has a tuberculosis infection, but he or she does not have and may not contract the disease

tuberculosis. This distinction is important. Millions of Americans have tuberculosis infection, many of them infected years ago when the disease was more common. But only a small percentage of those infected develop the disease; only those with the disease can suffer any impairment (not all do); and only those with the disease *in or around their lungs* can transmit the infection to other people, because only they can exhale tuberculosis bacteria. Not all persons with the disease of tuberculosis are contagious, although most with pulmonary tuberculosis are. Tuberculosis infection will usually produce a positive reaction to a tuberculin skin test. Whether a person has the disease and is infectious can be determined by analyzing a smear of sputum (material ejected from the lungs), either by staining the smear (which can be analyzed immediately) or by culturing the bacteria (which takes several weeks but is more sensitive). X-rays are used to reveal the presence of the disease, but cannot reveal whether it is contagious. Glassroth, Robins & Snider, *supra*, at 1441-43; *Harrison's Principles of Internal Medicine, supra*, at 1025-26.

About five percent of newly infected persons contract the disease within weeks or months. Far more commonly, the infection heals but leaves nodules in the lungs and elsewhere in the body. In most people, the nodules remain stable and eventually may calcify. But, if untreated, the infected person carries the risk of tuberculosis for the rest of his life. In five to fifteen percent of cases, one of the nodules breaks down (most commonly in the lungs) causing tubercle bacilli to multiply, and the person becomes ill with the disease of tuberculosis. Glassroth, Robins & Snider, *supra*, at 1441-42; *Diagnostic Standards, supra*, at 344. If properly treated with antibiotics, the infection is unlikely to develop into the disease. Glassroth, Robins & Snider, *supra*, at 1446-47; *Harrison's Principles of Internal Medicine, supra*, at 1029.

How contagious someone with the actual disease is varies from case to case depending upon the number

of bacilli in the individual's sputum. The risk of the diseased person transmitting the infection to others also varies with the closeness and length of contact and with how well ventilated the surroundings are. American Thoracic Society, *Control of Tuberculosis*, 128 Am. Rev. Respiratory Disease 336, 338-39 (1983) (hereafter "*Control of TB*"). The risk of the infection developing into the disease is highest in children under three years of age, lowest in later childhood, and high again in adolescents and young adults. Comstock, Livesay & Woolpert, *The Prognosis of a Positive Tuberculin Reaction in Childhood and Adolescence*, 99 Am. J. Epidemiology 134 (1974). Susceptibility at all ages is increased by various conditions, including malnutrition, silicosis, diabetes and alcoholism. *Control of Communicable Diseases in Man*, *supra*, at 412; *Diagnostic Standards*, *supra*, at 344; Comstock, *Frost Revisited: The Modern Epidemiology of Tuberculosis*, 101 Am. J. Epidemiology 363, 374 (1975).

The disease of tuberculosis manifests itself through a variety of symptoms. Some diseased people have no symptoms at all. J.A. 6; *Diagnostic Standards*, *supra*, at 346. Most experience persistent fatigue, loss of appetite, weight loss, irregular menses, low-grade fever or a combination of these ailments. Pulmonary tuberculosis (tuberculosis of the lungs, which is the most common form of the disease) characteristically produces a slight cough that worsens slowly over weeks or months. J.A. 6-7; *Diagnostic Standards*, *supra*, at 346. The disease may attack other organs besides the lungs, including the pleura (membranes around the lungs), the genitourinary tract, lymph nodes, bones and joints, meninges, peritoneum and other parts of the body. *Diagnostic Standards*, *supra*, at 346-47. If untreated or treated too late, tuberculosis may cause acute respiratory and other problems, and may lead to death.

People with the disease of tuberculosis are no longer sent to sanatoria; they are not generally quarantined or

hospitalized for the purpose of isolating them. Standard treatment is for patients to stay home and take daily doses of antibiotics. People in contact with the patient should receive preventive antibiotic treatment. Proper drug treatment will render most patients noninfectious in a brief period of time, usually in several days to a few weeks. They are then able to resume normal activities. *Control of TB*, *supra*, at 339-41; Glassroth, Robins & Snider, *supra*, at 1443-1444. Some with the disease can return to work immediately after being examined if there is no bacteria in the sputum. On the other hand, diseased individuals with a large number of organisms in the lungs may require several months to become noninfectious. After the patient becomes noninfectious, several more months of drug treatment are required to assure that the disease will not recur. Glassroth, Robins & Snider, *supra*, at 1445-46.

Florida state laws implicitly recognize that individualized decisions should be made about the risk posed to others by a person with tuberculosis. They require that the diseased person "has active tuberculosis *and* is dangerous to the public health" before requiring medical treatment. Fla. Stat. Ann. §§ 392.25, 392.26 (West 1986) (emphasis added). States commonly have communicable disease statutes that allow public health officers to isolate diseased persons based on their evaluation of a particular case, but the statutes do not establish blanket rules concerning the appropriate response to communicable diseases. See, *e.g.*, N.Y. Public Health Law § 2120 (McKinney 1985); Cal. Health and Safety Code § 3285(d) (Deering 1982). Similarly, while some states have laws requiring teachers to refrain from teaching when they have a contagious disease, those laws do not require that a teacher be fired. They leave employment decisions to the discretion of the employer. See, *e.g.*, Ariz. Rev. Stat. Ann. § 15-505(b) (1984) (specifying that "[a]ny continuing teacher who requests a leave of

absence [because of pulmonary tuberculosis] shall be granted a leave of absence"); Ill. Rev. Stat. ch. 122 § 24-5 (Smith-Hurd Supp. 1986); N.J. Stat. Ann. § 18A:40-10 (West 1968); N.Y. Education Law § 913 (McKinney Supp. 1986); Mass. Ann. Laws ch. 71, § 55B (Michie/Law. Coop. Supp. 1986); Minn. Stat. Ann. § 125.17 subd. 4(4) (West 1979); Tex. Rev. Civ. Stat. Ann. art. 4477-12 § 5 (Vernon Supp. 1986); Va. Code § 22.1-300 (1985).

C. Respondent's Tuberculosis

The record in this case reveals remarkably little regarding respondent's medical history and physical condition. The district court found, "No question that she suffers a handicap," but made no specific findings about respondent's medical history or condition. (Pet. App. C.)

The only medical witness in the case testified that respondent's medical records indicated that she had four positive tuberculosis cultures, indicating the presence of the disease, in 1957, 1977, and in March and November, 1978. J.A. 11-12. The only evidence of any physical impairment were affirmative answers to the questions: "[W]hether Mrs. Arline ever had the illness in an acute form in such a degree that it affected her respiratory system?" and "Was she ever hospitalized with the illness?" J.A. 11.

The severity or duration of respondent's illness is not clear. Nor is it clear when, why, or for how long she was hospitalized; what treatment, if any, she received; or how she responded to it. In May, 1981, respondent had a negative culture, indicating an absence of the disease, and apparently has had no subsequent positive cultures. J.A. 20.

Three reactivations of the disease of tuberculosis (or the continuation of one over more than a year—the record says nothing regarding any negative tests in the 1977-78 period) are extremely rare in properly treated

cases. *Control of TB, supra,* at 340. It is possible that respondent had a rare, resistant strain of tuberculosis. It is possible that she did not have an appropriate course of treatment. It also may be that she failed to take medicine which may have been prescribed for her. But the record simply does not address critical issues which are highly relevant to a proper disposition of any Section 504 case based on infectious disease—the severity and duration of respondent's physical impairment, the degree of infectiousness and the prospects for successful treatment.[3]

SUMMARY OF ARGUMENT

This case of first impression requires the Court to apply Section 504 to employment decisions made by recipients of federal funds regarding individuals suffering from communicable diseases. Millions of Americans suffer from communicable diseases annually, and communicable diseases, which range from polio to the common cold, vary widely in their impact on those afflicted and on those exposed. This case thus requires the Court to resolve a fundamental tension between protecting persons handicapped by a communicable disease from irrational discrimination and protecting third parties put at substantial risk by persons afflicted with such diseases.

The touchstone for resolving that tension under Section 504 and for thus ensuring that employment decisions about the handicapped ill are not made as a result of fear, stereotypes or prejudice is to require that recipients make reasonable employment decisions based on reasonable, individualized medical judgments about the nature, degree and duration of the handicap, if any, caused by the disease and the nature, degree and duration of risk to third parties.

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[3] The medical witness testified that she regarded respondent as "not highly infectious" in 1979 and that the possibility of her still being infectious at the time of the trial in 1983 was "remote." J.A. 42-43.

Unfortunately, this case of national importance comes before the Court on a sparse factual record. The district court did not make detailed findings about respondent's specific disease and its impact on her major life functions nor about the risk she posed to students. *Cf.* Fed. R. Civ. P. 52. The court of appeals' brief opinion does not cite to any part of the record developed at trial. Given the complexity and variety of communicable diseases and given the inadequate record presented on review, this Court should not attempt to resolve this specific controversy definitively but should instead offer general guidance for the lower courts to follow on remand. A cautious approach is warranted because this is the first Section 504 communicable disease case granted plenary review by this Court. But, given the current health care crisis relating to Acquired Immune Deficiency Syndrome ("AIDS"), it will, almost certainly, not be the last.

(A) With respect to the first question presented, this Court should not issue a blanket rule about whether persons suffering from the disease of tuberculosis are handicapped. It should affirm the court of appeals' ruling that the Rehabilitation Act's definition of "handicapped individual" does not categorically exclude all those who suffer from a communicable disease. Although it appears that respondent may have been handicapped in a statutory sense, this Court should vacate the judgment below that *all* persons with tuberculosis are handicapped with instructions to remand the case to the district court to determine the medical facts relating to the nature, degree and duration of respondent's impairment. Only after these findings of *medical* fact have been made can a district court determine whether respondent satisfies the *legal* requirement that her impairment "substantially limits major life activities" or that she otherwise falls within the statutory definition. The disease of infectious tuberculosis may have limited impact on an individual's activities, although prejudice against those with tuberculosis may, in particular cases, still require a holding under the statutory definition that a person is "handicapped" for purposes of Section 504.

(B) With respect to the second question presented, this Court again should refrain from issuing a blanket rule about whether persons suffering from infectious tuberculosis are "otherwise qualified" to serve as elementary school teachers. In many cases today, drug therapy can arrest the disease, remove infectiousness and prevent a recurrence of both the disease and infectiousness. After a short work leave for treatment, a tuberculosis patient may pose no risk to others. In certain limited circumstances, such therapy may be less successful. In other words, although persons should not teach while contagious with tuberculosis, it does not follow that such persons may reasonably be fired if treatment renders them noncontagious within the employer's normal period for sick leave or leave without pay.

The court of appeals correctly remanded this case to the district court for individualized findings relating to the risk posed to students by respondent. Only after findings of medical fact have been made relating to the risk to third parties posed by ill handicapped individuals can courts address the legal question of whether that person is "otherwise qualified" for employment. The court of appeals, however, erred in its instruction that the Nassau County School Board has an affirmative obligation to find respondent another job, even if she were not otherwise qualified for her present job and even if the School Board does not have an existing policy of providing alternative employment in like circumstances.

(C) An alternative framework suggested by the Justice Department for applying Section 504 in the context of employment decisions about individuals handicapped by AIDS, which logically applies to all communicable diseases, is incorrect as a matter of law and sweeps far too

broadly. Although one effect of a handicap may be that it poses a risk of harm to others, employers should not, as the Justice Department suggests, be allowed to discriminate irrationally against a handicapped individual based on a fear of such risk. The better course prescribed by Section 504 is to determine whether such a handicapped individual is "otherwise qualified" for employment by asking whether an employer has made a reasonable decision based on a reasonable medical judgment about the risk to third parties.

ARGUMENT

I. A PERSON AFFLICTED WITH A COMMUNICABLE DISEASE MAY BE "HANDICAPPED" UNDER SECTION 504

A. Legal Standards

Section 7(7)(B) of the Rehabilitation Act of 1973, as amended in 1974, defines a handicapped person covered by the anti-discrimination provisions of Section 504 as follows:

> "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(7)(B).[4]

This statutory definition was explicated in the general Section 504 regulation issued by the Secretary of Health, Education, and Welfare in 1977. 42 Fed. Reg. 22676 (1977); 45 C.F.R. 84.3(j). A "physical or mental impairment" is defined as:

> "(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 C.F.R. 84.3(j)(2)(i).

"Major life activities" include, but are not limited to, functions such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. 84.3(j)(2)(ii).

The initial inquiry under part (i) of the statutory definition is to determine the *medical* facts about: (a) whether a person is suffering from a physical or mental impairment (from a physiological disorder, cosmetic disfigurement, anatomical loss or mental/psychological disorder); (b) the degree to which that impairment affects major life activities; and (c) the duration of both the impairment and its impact on major life activities. Once the trial court has found the medical facts on these issues, it must then decide the *legal* question of whether the degree and duration of the impairment constitute a *substantial* limitation on major life activities in the statutory sense.[5] The definition of handicapped does not include those whose impairments impose limitations on major life activities that are "insubstantial."

The statutory requirement of "substantial" limitation on a major life activity is defined neither in the statute nor in the general 1977 Section 504 regulations. See 45

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[4] In 1974, Congress broadened the scope of the statutory definition of "handicapped individual" as used in Section 504. Pub. L. No. 93-112, 87 Stat. 361. See S. Rep. No. 93-1297, 93rd Cong., 2d Sess. 37-38 (1974).

[5] Parts (i) and (ii) of the statutory definition must be satisfied with medical evidence, and thus the inquiry into medical facts under part (ii) is similar to the inquiry under part (i). Part (iii), however, may be satisfied by subjective evidence of an employer's or "other's" attitudes about the person claiming unlawful discrimination. 45 C.F.R. 84.3(j)(2)(iv) and App. A at 311.

C.F.R. Pt. 84, App. A, at 310 (1985) (no blanket definition possible).[6] Nonetheless, the definition strongly indicates that a person suffering from an impairment that is not chronic, but is instead of limited duration, may nonetheless be considered "handicapped" for purposes of Section 504. The regulatory history makes clear that a "disease" may be a handicap, and diseases are often of limited duration. See, *e.g.*, 41 Fed. Reg. 20298 (1976); 41 Fed. Reg. 29550 (1976); 45 C.F.R. Pt. 84, App. A at 310-311 (1985).[7] Moreover, part (ii) of the definition, which may be satisfied independently, refers to those who have "a record of such an impairment," clearly indicating that persons may be handicapped for statutory purposes even if they no longer suffer from a physical or mental impairment.[8] Part (ii) by necessary implication indicates that a person with a condition of limited duration could be considered "handicapped" under part (i).

Accordingly, a person suffering from a communicable disease of limited duration is a "handicapped person"

[6] Courts have thus considered the issue on a case-by-case basis. *E.E. Black* v. *Marshall*, 497 F. Supp. 1088, 1099 (D. Hawaii 1980) (definitions in Rehabilitation Act are "personal" and must be evaluated on an individual basis). See also *Oesterling* v. *Walters*, 760 F.2d 859, 861 (8th Cir. 1985); *Jasany* v. *U.S. Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985).

[7] The analysis accompanying the 1977 Section 504 regulations states that the Secretary of Health, Education, and Welfare had no authority under the statute to limit the "term [handicapped] to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps." 45 C.F.R. Pt. 84, App. A at 310 (1985).

[8] This view is supported by the legislative history. The 1974 Senate Report, which describes the broadened definition of handicapped, states that part (ii) "is intended to make clearer that the coverage of Sections 503 and 504 extends to persons who have recovered—in whole or in part—from a handicapping condition . . . ." S. Rep. No. 1297, 93rd Cong., 2nd Sess. 39 (1974).

under part (i) of the statutory definition if the disease *substantially* limits major life activities both in terms of degree of impairment and in terms of the duration of the impairment. This conclusion is consistent with the general approach of the federal courts in construing the term "handicapped person" broadly and then considering the merits of Section 504 suits pursuant to other statutory requirements.[9]

B. Errors Below

The district court did not follow the inquiry mandated by the statute when it determined that respondent was not handicapped in a statutory sense. Instead, citing no legislative materials, no case law and no materials of record, the district court issued a blanket ruling from the bench that no person with a contagious disease falls within the statutory definition:

> "No question that [respondent] suffers a handicap and it is most unfortunate that she suffers or did suffer from this particular infectious tuberculosis, but it's difficult for this Court to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person as that act has been implemented and decided by the various courts." (Pet. App. C.)

[9] *Bento* v. *I.T.O. Corp.*, 599 F. Supp. 731, 741 (D.R.I. 1984); *Vickers* v. *Veterans' Administration*, 549 F. Supp. 85, 87 (W.D. Wash. 1982). Attention to both the degree and duration of a handicapping disease is justified in light of the general principle that courts have an independent duty to keep the broad sweep of Section 504 "within manageable bounds." *Alexander* v. *Choate*, 105 S. Ct. 712, 720 (1985). A person with a three day flu might have major life activities "substantially limited" in terms of degree but not in terms of duration. It is hard to believe that Congress intended Section 504 to reach employment claims of persons so briefly afflicted, unless the claimant could satisfy part (iii) of the statutory definition because he was discriminated against on the basis of an employer's irrational view of his illness. This is, hopefully, a largely hypothetical concern because employers would not likely discharge an employee for having influenza.

This sweeping conclusion is clearly wrong, as the analysis above demonstrates. Whether a person with a communicable disease is handicapped in a statutory sense turns on an *individualized* medical judgment about the nature, degree and duration of the impairment caused by the disease and then on a legal judgment whether that impairment is "substantial."

Although the court of appeals properly ruled that the district court's holding was incorrect as a matter of law, it then erred by not remanding the case for development of the facts under the appropriate legal standards. Instead, without citing to any materials of record or any judicially noticeable medical literature, the court of appeals summarily concluded that all persons with tuberculosis are "handicapped" and that the respondent was handicapped under all three parts of the statutory definition. (Pet. App. A.) It is, of course, elementary that appellate courts should not independently find facts.[10] And it is the sound practice of this Court not to review the record *de novo* and make independent factual findings when the courts below have failed to do so. See, *e.g.*, *City of Kenosha* v. *Bruno*, 412 U.S. 507, 514 (1973) (remanding in light of district court's failure to make necessary findings on record).

As indicated above, the appropriate approach to Section 504 cases involving individuals with communicable diseases is to require the trier of fact to make findings based on reasonable medical judgments regarding the nature, degree and duration of the impairment. This is true even with respect to tuberculosis, which may substantially impair some victims of the disease yet may have a relatively insubstantial impact on the major life activities of other victims. See pp. 2-4, *supra*. Although it may well be that respondent was sufficiently

[10] See, *e.g.*, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92 (1982); *DeMarco* v. *United States*, 415 U.S. 449, 450 (1974); *Green* v. *Zant*, 715 F.2d 551, 559 (11th Cir. 1983).

impaired to be handicapped under the statutory definition,[11] this Court should decline either to issue a blanket ruling that all those suffering from the disease of tuberculosis are handicapped or to apply the appropriate legal standards to the facts put in evidence below in the absence of the necessary factual inquiry by the district court. This conclusion is buttressed by the paramount importance in Section 504 communicable disease cases of making individualized findings of relevant medical facts.

C. Inquiry on Remand

Accordingly, this Court should not, on this record, decide the first question presented by petitioners. It should affirm the court of appeals' holding that an individual with a communicable disease *may* be handicapped under the statutory definitions. But it should vacate the judgment below with instructions to remand the case to the district court to determine, in the first instance, the medical facts relating to the nature, degree and duration of impairment caused by respondent's disease. Only then should the district court consider the legal questions of whether the statutory definition of a "handicapped individual" has been satisfied in light of an individualized set of factual findings.

II. A PERSON WITH A COMMUNICABLE DISEASE MAY NOT BE "OTHERWISE QUALIFIED" FOR EMPLOYMENT UNDER SECTION 504

A. Legal Standards

Section 504 provides that

> "No *otherwise qualified* handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of,

[11] It appears that respondent's respiratory functions may have been seriously affected and that she needed to be hospitalized. J.A. 11. If so, she could satisfy either part (i) or part (ii) of the statutory definition.

> or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (emphasis supplied).

As a general matter, an "otherwise qualified" person is one who is able to meet all of a "program's requirements in spite of his handicap." *Southeastern Community College* v. *Davis*, 442 U.S. 397, 406 (1979).

In the context of employment, an individual may not be "otherwise qualified" in a statutory sense if, because of the handicap, such person is not capable of performing required work or is a danger to himself or to others at his place of employment.[12] With respect to the last condition, danger to others, it is obviously an implicit requirement of every employment program that employees not unduly put others in the workplace at substantial risk. And it is equally obvious that a person with a communicable disease may not be "otherwise qualified" because the threat of the disease's communicability poses an unreasonable risk of harm to others.

Nonetheless, it is also clear that in any given case the risk to others may be highly remote or may be too insignificant to serve as a reasonable basis for adverse employment actions.[13] To determine whether a person handicapped by a communicable disease is "otherwise qualified" for employment *in light of the potential risks to others*, courts should, again, undertake a two-step inquiry.

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[12] See, *e.g.*, *Southeastern Community College* v. *Davis*, 442 U.S. 397, 407 (1979) (risk to others); *Doe* v. *New York University*, 666 F.2d 761, 777 (2d Cir. 1981) (risk to self and others); *Doe* v. *Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402, 1410 (5th Cir. 1983) (risk to others). *Cf. New York State Association For Retarded Children, Inc.* v. *Carey*, 612 F.2d 644, 650 (2d Cir. 1979) (risk to others).

[13] *Cf. Strathie* v. *Department of Transportation*, 716 F.2d 227 (3rd Cir. 1983); *Coleman* v. *Casey County Board of Education*, 510 F. Supp. 301 (W.D. Ky. 1980).

First, courts should find facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. Assuming the employer has made the employment decision on an assessment of the medical risks, as he should if he is acting in light of an employee's disease, then it is necessary, before a decision regarding the "otherwise qualified" issue can be made, that courts make individualized findings on these risk issues. These findings must be based on the medical evidence evaluated by the employer and other evidence available to the court.[14] Obviously, the likelihood of injury and the extent of harm can vary widely with different diseases and different individual responses to those diseases.[15]

Second, courts must make the legal judgment whether the recipient of federal funds has made an employment decision that bears a "reasonable" relationship to a reasonable medical judgment about the nature, degree, se-

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[14] The question of appropriate burdens of proof is not presented in this case. See generally, *Doe* v. *New York University*, 666 F.2d at 776 (allocating burdens of proof). The reasonableness of an employer's decision is analyzed by the courts from the perspective of the medical knowledge an employer had at the time the decision was made. *Bento* v. *I.T.O. Corporation*, 559 F. Supp. 731, 743-44 (D.R.I. 1984); *Bey* v. *Bolger*, 540 F. Supp. 910, 926 (E.D. Pa. 1982).

[15] The need for individualized determinations does not preclude an employer from adopting employment policies that establish general health guidelines. Such guidelines would be lawful if they are based on reasonable medical judgments and if they are applied to specific cases based on medical judgments as to whether individuals fall within the guidelines. *Cf. New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979).

verity and probability of the risk posed to others by the person handicapped by a communicable disease in light of the employer's general job policies. This particular rule in the context of the risk of communicable diseases is derived from the general rule under Section 504 for deciding the "otherwise qualified" issue, which this Court announced in *Southeastern Community College* v. *Davis*, *supra*, and restated succinctly in *Alexander* v. *Choate*, 105 S. Ct. at 720:

> "*Davis* thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs; while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."

See also, 45 C.F.R. 84.12 (requirement of reasonable accommodation in employment cases).

To protect the handicapped ill, Section 504 requires that a federal fund recipient make employment decisions based, not on prejudice or stereotype, but instead on a reasonable medical judgment. To keep Section 504 "within manageable bounds," *Alexander*, 105 S. Ct. at 720, recipients need do no more—and no less—than make a reasonable employment decision in light of those reasonable medical judgments.[18] *Cf. Jacobson* v. *Massachusetts*,

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[18] This general rule regarding communicable diseases finds support in the lower court cases addressing the question of whether a handicapped individual is "otherwise qualified" for employment when the individual poses a danger to others, even though that risk may arise from causes other than a communicable disease. See, *e.g.*, *Doe* v. *New York University*, 666 F.2d at 777; *Doe* v. *Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d at 1410.

A federal fund recipient may successfully defend a Section 504 action by making a reasonable employment decision based on medical judgments within a reasonable professional range. Federal courts should not choose between conflicting medical judgments

197 U.S. 11 (1905) (compulsory small pox vaccinations upheld against substantive due process challenge).

B. Errors Below

The district court concluded that respondent was not "otherwise qualified" for her teaching position because she had suffered from an infectious disease. (Pet. App. C.) But, once again, this blanket holding was not justified by any analysis of the risks presented and any findings of fact specifically describing the risk posed by respondent. A court must make findings about the nature, duration, severity and probability of the risk to others before it can determine whether a federal fund recipient's employment decision is reasonably related to a reasonable medical judgment.

Given the lack of findings, the court of appeals was, therefore, correct in remanding the case to the district court and in requiring determinations relating both to the risks in this individual case and any claim by respondent that a "reasonable accommodation" in her present job existed. The court of appeals erred, however, when it directed the district court on remand to determine whether the school board could find respondent "another position teaching less susceptible individuals, or in some other kind of position in the school system." (Pet.

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offered by plaintiff and defendant, if defendant recipients can demonstrate that the medical evidence upon which he relied was within the range of reasonableness, given then current medical knowledge. *Cf. Doe* v. *Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d at 1410-1412. Deference should be given to employment decisions rationally related to *reasonable* medical judgments relied upon by federal fund recipients. See generally, *Bento* v. *I.T.O. Corp.*, 599 F. Supp. 731, 744 (D.R.I. 1984) (recipients' actions must have a "reasonable basis"). *Cf. Kampmeier* v. *Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977) (upholding decision of school officials to exclude students with vision in only one eye from contact sports where the officials "relied on medical opinion that [the] children . . . [were] not qualified.").

App. A.) While employers have an obligation to make a reasonable accommodation for an employee who suffers a handicap while on a job, they do not have an affirmative duty to find an employee another job if the employee is not otherwise qualified for his or her present job and if the employer does not have an existing policy of providing alternative employment. See 45 C.F.R. 84.12 and App. A at 315-316 (1985).

C. Inquiry on Remand

Accordingly, on this record, this Court should not definitively decide the second question presented. *Cf. Gurmankin* v. *Costanzo*, 556 F.2d 184 (3rd Cir. 1977), *cert. denied*, 450 U.S. 923 (1981) (due process violation for school board to make blanket rule about blind teachers). As indicated above, unless an individual has incurred a particularly virulent strain of tuberculosis that is not susceptible to treatment, drug therapy may completely arrest the disease, remove any infectiousness and prevent its recurrence. Under those circumstances, a person who has previously suffered tuberculosis and who follows the proper course of drug therapy may present no future risk to anyone at the workplace. See pp. 4-8, *supra*.

This distinct possibility underscores the importance of vacating and remanding for further proceedings (a) to make findings relating to the medical facts regarding the nature, duration, severity and probability of risk of harm to third parties in this case and (b) to determine whether the school board's employment decision was reasonably related to a reasonable medical judgment about that risk. Indeed, although elementary and secondary school teachers have to be tested for tuberculosis under state laws,

[17] The general Section 504 regulations promulgated by HEW in 1977 do not require an employer to find an employee, who is not "otherwise qualified," another job. They only require a reasonable accommodation in a present job. See 45 C.F.R. 84.12 and App. A at 315-316.

those states do not have a fixed rule regarding the employment disposition once a teacher is diagnosed as having the disease. See p. 8, *supra*.

III. THE JUSTICE DEPARTMENT'S FRAMEWORK FOR APPLYING SECTION 504 TO EMPLOYMENT DECISIONS REGARDING THOSE HANDICAPPED BY A COMMUNICABLE DISEASE IS INCORRECT

In a recent opinion, the Office of Legal Counsel of the Department of Justice set forth a different approach to the application of Section 504 to employment decisions affecting those with communicable diseases in general and AIDS in particular.[18] With respect to the statutory definition of a "handicapped individual," the DoJ Opinion makes a crucial distinction between (a) the disabling effects of a communicable disease on its victims, which qualify as handicaps, and (b) the ability of the victims to spread the disease to others, which "is not itself a handicap." DoJ Opn. at 27. The Opinion then concludes that, because the ability of the victims of a communicable disease to spread the disease is not a "handicap," Section 504 "simply does not reach decisions based on fear of contagion—whether reasonable or not . . . ." Thus, according to the opinion, if an employer discharged an employee based solely on a *fear* of the risk of a disease's communicability, rather than a reasonable medical judgment about that risk, there would be no "discrimination" in a statutory sense "solely on the basis of handicap." *Id.* at 29-32.

This proposed framework does violence to the fundamental Congressional purpose of Section 504 of protecting handicapped individuals from decisions based on fear, prejudice or stereotype. See, *e.g.*, S. Rep. No. 1297, 93

[18] "Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus," June 20, 1986 [hereafter "DoJ Opn."]. This opinion has been lodged with the Court by petitioners.

Cong., 2nd Sess. (1974). It also does violence to the statutory language and to the decisions of this Court.

First, and most fundamentally, the Justice Department opinion misconstrues the statutory meaning of a "handicap." Section 504 applies to "handicapped individuals" and Section 7(7)(B) defines "handicapped individuals" as, *inter alia*, "any person who (i) has a physical or mental impairment which substantially limits one or more of such persons' major life activities." The implementing regulations define "physical impairment" as any "physiological disorder or condition . . . affecting one or more of the . . . body systems . . . ." 45 C.F.R. 84.3(j)(2)(i). When Section 504, Section 7(7)(B) and the implementing regulations are read together, it is clear that, for Section 504 purposes, a handicap is an impairment that causes certain limiting effects on life activities. But it is the impairment, not just the effects of the impairment on the afflicted individual, that is the "handicap," in the statutory sense. This plain reading of the statute and the regulations is borne out by the analysis of HEW that accompanied the 1977 general Section 504 regulation.[19]

Thus, if a disease like tuberculosis substantially limits a person's major life activities, then tuberculosis is the impairment or handicap, including, but not limited to, the effects of that disease. In those circumstances, a federal fund recipient could not, therefore, discriminate against an individual "solely on the basis of" the disease of tuberculosis (including the effects of the disease on the victim and on third parties), unless that individual were not "otherwise qualified" for employment.[20] The

[19] See 45 C.F.R. Pt. 84, App. A, at 310 (1985) (the "impairment" is the "handicap", not *just* the effects of that impairment) and 311 (alcoholism and drug addiction are diseases; diseases are impairments; drug addiction or alcoholism, not just their effects, may be considered handicaps).

[20] A person who has no symptoms of a communicable disease but nonetheless carries it may not be handicapped within the statutory definition because being a pure carrier may not, depending on medical evaluations and legal judgments, significantly limit the carrier's major life activities. But it does not follow that a person who is ill with the disease and who meets the statutory definition of "handicapped individual" enacted by the Congress may be irrationally discriminated against because of one of the effects—communicability—of the disabling disease. *Cf.* DoJ Opn. at 29-32.

Justice Department's distinction between the effects of an impairment on the individual and the effects on third parties for purposes of determining what is a handicap thus does not find support in the legislative purpose or language or in the relevant regulatory history.

Second, the Justice Department's approach sweeps much too broadly. Many handicapped individuals may pose a degree of danger to others, either by virtue of a communicable disease or for other reasons. See *Southeastern Community College* v. *Davis*, 442 U.S. at 407 (hearing disability in nurse could pose danger to patients). But, rather than allowing employers to act irrationally toward such handicapped individuals based on a fear of a perceived danger to third parties, the better course, as set forth in *Southeastern Community College*, is to focus on the issue of whether the handicapped individual is "otherwise qualified."

Indeed, this Court has stated that "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under [Section 504] would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped." *Alexander* v. *Choate*, 105 S. Ct. at 720, n.19. Rather than focusing, as the DoJ Opinion does, on different effects of a single handicap and allowing irrational discrimination with respect to one of those effects not deemed a "handicap," the better approach, mandated by *Davis* and *Alexander* and urged by the AMA in this brief, is to require federal fund recipients to take reasonable, but not funda-

mental, steps or modifications in accommodating handicapped individuals. In the context of this case, of course, that means federal fund recipients may make employment decisions that are reasonably related to reasonable medical judgments about the risks to third parties posed by individuals with communicable diseases—no more is required but also no less.[21]

CONCLUSION

Accordingly, the AMA respectfully submits that the framework set forth in this brief for analyzing the application of Section 504 to employment decisions by federal fund recipients comports with the statute and fairly resolves the statutory tension between protecting individuals who suffer from a handicapping communicable disease and protecting third parties exposed to risk by those with such a disease. For the limited reasons stated above, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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July, 1986

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[21] Employment decisions about AIDS victims, like decisions about anyone handicapped by a communicable disease, should thus be based on reasonable medical judgments about their handicap and their risk to others and not, as the DoJ opinion would allow, on irrational fear of the handicapped individual's ability to communicate the disease.

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No. 85-1277

IN THE

Supreme Court of the United States

October Term, 1985

The School Board of Nassau County, Florida, et al.,
Petitioners,

v.

Gene H. Arline,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

This brief amicus curiae in support of Petitioners is submitted with the written consents of counsel to all parties. Letters of consent are on file with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's fifty state school boards associations, the District of Columbia school board and the Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity and educational productivity of

the public schools as well as for the health and safety of students and employees while inside the public schools within their jurisdictions.

ISSUES PRESENTED FOR REVIEW

1. Whether the contagious, infectious disease of tuberculosis constitutes a handicap within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 701, et.seq.

2. Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504, 29 U.S.C. 794.

ARGUMENT

I. INTRODUCTION

The decision below errs in at least two regards. First, it fails to recognize

that health considerations are equally appropriate as those involving academics and experience in making employment decisions. Second, the decision errs in its requirement that the school board must consider other positions for Ms. Arline as a "reasonable accommodation" to her handicap.

Section 504 is a non-discrimination statute designed to assure that employers evaluate handicapped persons on the basis of characteristics relevant to the position for which they are being considered. The statute prohibits discrimination against "otherwise qualified" handicapped individuals in federally assisted programs or activities. The statute is patterned after similar laws protecting minorities (title VI of the Civil Rights Act of 1964, 42 U.S.C.

2000(d)) and women in education (title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq).

The purpose of Section 504 is to protect handicapped persons from unreasoned employer action based on prejudices resulting from fears and biases of the public regarding disabilities or diseases.

The National School Boards Association supports the law and the intent of its makers.

However, Amicus submits that Congress did not intend Section 504 to require an employer to ignore the handicap of an employee or job applicant. Here the metaphor drawn on the model of racial discrimination is not applicable. Whereas race would rarely, if ever, be a relevant basis for determining whether one is

qualified for a position, a handicapping condition - or the results of the handicapping condition - may be very relevant to the ability of the employee to carry out the duties of the job in a safe manner.

Employment criteria, particularly in the context of the public schools, include more than the technical educational and experience requirements. The criteria also include the ability to supervise children and a classroom in a safe manner. Indeed, the failure to provide such supervision could subject the school district to liability in tort.

The "reasonable accommodation" requirement, if valid at all, is appropriate only to the limited extent of requiring an employer to make minor changes in work schedules, location of the

work station, etc. Certainly nothing in the legislation authorizes the Department or a court to require an employer to ignore a legitimate job criterion or to create a new position for a handicapped employee who does not meet the qualifications of another position.

II. TUBERCULOSIS IS A "HANDICAP" UNDER SECTION 504

The district court below held that, although Ms. Arline "suffers from a handicap...it's difficult for this court to believe that Congress intended contagious diseases to be included within the definition of a handicapped person..." under Section 504. The court of appeals disagreed and went farther to hold that, if indeed Ms Arline is found on remand not to be "otherwise qualified" for the position of elementary-school teacher, the district must seek other means to

"reasonably acommodate" her lack of qualification by attempting to find another position for her in the school district.

It should be noted that the court of appeals incorrectly stated that Ms. Arline was dismissed because of her "susceptibility" to tuberculosis. Arline v. School Board of Nasssau County, 772 F.2d 759, 760 (11th Cir. 1985). Her dismissal arose out of the fact that "despite appellee's cooperation in a vigorous anti-tuberculosis program since 1977, she had positive tuberculosis cultures" three times in two years and public health officials informed the board that she posed an unacceptable risk of infection to children in her classroom. School Board of Nassau County v. Arline, 408 So.2d 706 (D.Ct. App. Fla 1982).

Amicus disagrees with the analysis of both courts. Undoubtedly, Congress did not intend to prohibit employers from taking into account the level of infectiousness of an employee's disease, in making a decision whether to hire a job applicant or retain an employee. However, one need not redefine "handicapped individual" in order to reach that result.

It is the position of amicus that Ms. Arline is a "handicapped individual" under the broad definition in Section 504 which includes persons with disabilities resulting from tuberculosis. However, the level of infectiousness of her disease at the time Ms. Arline was removed from her position, prevented her from being "otherwise qualified" for her position as elementary-school teacher. Thus, the school board's action in terminating her

employment was not discrimination on the basis of handicap. The school board's action was taken because of Ms. Arline's failure to meet the reasonable job-related requirements of her employer.

Two questions must be answered in determining whether an employer has discriminated on the basis of handicap. The answer to the first - whether a person has a "physical or mental impairment which substantially limits one or more of such person's major life activities" (or a record of such an impairment or is perceived as having such an impairment) - determines whether the plaintiff meets the definition of "handicapped individual" under Section 504. The answer to the second question - whether the person is "qualified" for the job in spite of the handicap - determines whether any adverse

action taken by the employer constitutes illegal discrimination against the person.

The district court built its analysis on the proposition that a person who has a disease infectious to others in a classroom situation is not "handicapped" under the definition in Section 504.

However, rather than holding these persons not to be handicapped, the same result is more appropriately reacned by interpreting "otherwise qualified" to exclude handicapped persons who are capable of infecting others.

A unique analysis recently developed by the Office of Legal Counsel, Department of Justice raises another question: whether "communicability" is a "handicap. On June 23, 1986 the Department issued a Memorandum for Ronald E. Robertson, General Counsel for the Department of

Health and Human Services on the subject of the Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus. That memorandum opines that a person with "full-blown AIDS" is "handicapped" within the definition of Section 504, but a person who is a "carrier" of the disease is not "handicapped" solely because he/she is a "carrier."

Rather than treating the person's "communicability" or "infectiousness" as a characteristic which may legally be taken into account by an employer in determining whether the person is "otherwise qualified" the Department of Justice, in guiding federal civil rights investigators, rules that an employer is not discriminating on the basis of

handicap, when the employer takes adverse action against an employee because of a fear of the employee's contagiousness - whether or not the fears are justified.

Under this analysis, the school board's actions in the instant case would clearly be upheld because the board initially hired Ms. Arline knowing she had a history of tuberculosis and took action to terminate her status only when they discovered she was contagious. Whether the Court accepts the Justice Department's interpretation, and rules that "contagiousness" is not a handicap, or merely rules that contagiousness may be taken into account in determining whether a handicapped person is "otherwise qualified," it is clear that the school district did not discriminate on the basis of handicap in violation of Section 504.

III. INFECTIOUSNESS OF THE EMPLOYEE'S DISEASE IS A LEGITIMATE JOB DISQUALIFICATION.

A. An employer may consider an individual's physical health in determining whether the person is qualified for a position.

Once deciding that a person with tuberculosis is "handicapped", the court must then determine whether the person is "otherwise qualified" for the position for which she or he is applying or in which she or he is seeking retention.

All but two states require teaching certificates and use them to determine "qualification" with regard to subject-matter training and experience. A state or school board may include a variety of additional qualifications in a position description for a teacher, which are not related to subject-matter training

and experience. These might include citizenship; Ambach v. Norwick, 441 U.S. 68 (1979); residency in the school district, McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976); good character or at least no evidence of immorality which would adversely affect the teacher's ability to be an appropriate role model for young children; and freedom from mental or physical disease which could adversely affect the person's ability to perform the job.

The requirement of good health is no less a "qualification" for the position of teacher than is a teaching certificate, because the requirement directly affects the ability of the person to perform a very important function in the classroom - to assure the health and safety of the students within his/her charge.

The lower court takes the view that because Ms. Arline's handicapping condition does not relate to her academic qualifications for the job, that condition cannot be taken into account in determining whether she is "otherwise qualified" for the position. The error of this rationale is clear. Certainly no one would seriously disagree that a teacher, who intentionally assaults and batters her students, is unqualified for the position. Similarly, a teacher who transmits a serious disease to her students lacks a crucial job qualification.

This Court has recognized that a recipient of federal funds is justified in taking the health of an applicant into account in determining whether the person is "otherwise qualified." In Southeastern Community College v. Davis, 442 U.S. 403

(1979), this Court upheld a college's right to take physical limitations into account in determining "qualification" for admission to the college's nursing school:

> "Taken literally, [the court of appeals'] holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be 'otherwise qualified.'...An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Id. at page 406.

Regulatory provisions under the Rehabilitation Act also provide support for an employer's considering a person's physical condition in making employment decisions.

The pre-employment section of the Department of Education regulation authorizes employers to condition

employment on the results of a medical examination. 34 C.F.R. section 104.14(c). Likewise, the Department of Labor regulations under section 503 allow federal contractors to apply physical or mental job qualification requirements in the selection of applicants for jobs or in making other changes in employment status such as promotion, demotion or training. The regulation recognizes that such requirements may "tend to screen out qualified handicapped individuals" but nonetheless permits contractors to use them so long as the requirements can be shown to be job related and "consistent with business necessity and safe performance of the job." Under the regulation contractors may also require comprehensive medical examinations prior

to employment. 41 C.F.R. section 60-741.6(c).

Analogous to employees with contagious diseases are employees who are drug or alcohol abusers. In it discussion of drug and alcohol abusers in its Section 504 regulation, the Department of Health, Education and Welfare's takes the position that an employer may take into account the fact that, because of his or her handicap, an employee poses a danger to others.

> "The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug

addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus , a recipient may consider - for all applicants including drug addicts and alcoholics - past personnel records, absenteeism, disruptive, abusive, or dangerous behavior...." 34 C.F.R. section 104, App. A, subpart A, section 4.

The Congress apparantly agreed with HEW that drug and alcohol abusers should not be protected by the law to the extent their disability affects job performance.

After the regulation was published, the Congress amended the definition of "handicapped individual" to exclude drug and alcohol abusers "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. section 706(7)(B).

B. An employer may consider whether a person's disease will endanger others in determining whether the person is qualified for the position.

The Department also has taken the position that characteristics or symptoms of diseases wnich may endanger others in the workplace, may be taken into account in determining whether a person is qualified for the position. For example,

in Appendix A to the Section 504 regulation in its discussion of pre-employment inquiries, the Department states:

> "[E]mployers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees." 34 C.F.R. 104, App. A, Subpart B, Section 18.

The Equal Employment Opportunity Commission also demonstrated concern for the health and safety of other employees in the regulations it promulgated under section 501 of the Rehabilitation Act which governs employment practices of the federal government with regard to handicapped individuals. The definition of a "qualified handicapped person" for purposes of this statutory provision

specifically states that in order to be qualified a handicapped individual must be able to "perform the essential functions of the position in question without endangering the health and safety of the individual or others...." 29 C.F.R. section 16134.702(f).

Because of the infectious nature of tuberculosis, an individual with the disease may not be able to perform his or her job without endangering the health of others in the workplace.

Tuberculosis is an "airborne" disease, spread by a germ called the "tubercle bacillus." Persons catch the disease by inhaling the bacilli suspended in droplets of moisture in the air from an infected person's cough or sneeze. Infected persons often do not develop the disease because their immune system

prevents the bacilli from multiplying. In a small proportion of people (about 5%), the germs immediately take hold and multiply. The infection can last for life and symptoms of the disease show up later in life in an additional 5% of infected persons. Infection from years earlier may progress to disease during periods of stress caused by other illnesses or physical or emotional hardship, but often for no apparent reason.

The greatest danger to persons in contact with an infectious "carrier" is the long-term threat of tuberculous infection. Perhaps because young children, i.e. those less than 5 years of age, have a less well developed immune system, they are more susceptible to developing tuberculosis than are older children and adults. Tuberculosis,

Department of Health, Education and Welfare, Public Health Service/Center for Disease Control.

However, given the same duration and intensity of exposure, there is no evidence that young children are at greater risk of acquiring infection. Older children in a classroom situation and other teachers or employees would be expected to have the same risk of becoming infected in Ms. Arline's school as the elementary age children, if they had been exposed for the same length of time in the same classroom. The school district should be concerned that students and co-workers are not subjected to tuberculosis infection, even though the infection may never bloom into the disease itself, or may occur after the person has left the school district.

Petitioners in the Reply Argument note that persons with other communicable disease such as AIDS, would be subject to the precedent set in this case. That is true. However, AIDS is a very different disease from tuberculosis. Although far more serious in consequence (over 55% of reported cases have died), AIDS is relatively difficult to catch. It is a blood-borne disease spread by intimate sexual contact or injection into the blood stream, and not by casual contact in the classroom situation. Therefore, although AIDS is a "communicable" disease, the near impossibility of casual transmission makes it likely that a teacher with AIDS would be considered "otherwise qualified" to teach young children.

In any case, the determination of whether the person is "otherwise

qualified" for the position should be determined by the school district, based upon the medical advise of public health officials.

IV. COURTS AND LAWMAKERS RECOGNIZE LIMITATIONS ON THE ADMISSION TO PUBLIC SCHOOLS OF STUDENTS AND EMPLOYEES WITH COMMUNICABLE DISEASES.

A. State laws regulate the presence of persons with communicable diseases in the public schools.

In deciding whether to hire or retain a teacher with a communicable disease, school district officials must also take into account state communicable disease statutes.

Virtually every state in the country regulates those with "communicable diseases." The statutes designate certain diseases which may require isolation of "carriers", see e.g., N.Y. Public Health Law § 225(5)(h)(2); or

require doctors to report to public health officials instances of certain diseases, see, e.g., Ariz. Rev. Stat. Ann. §§ 36.621 et seq.; D.C. Code Ann. § 6-119.

Nearly all the states have also enacted laws directly related to the health of school children. All states except two require immunization of public school students. E.g., Mont. Rev. Codes Ann. § 40-5-408; Or. Rev. Stat. § 433.267; Va. Code § 22.1-270. See Appendix. According to a recent study by the Education Commission of the States, 46 states exclude pupils from regular school attendance because of illness. At least 34 of these states specifically mention the presence of a contagious disease as a basis for excluding students from the regular school system. See Appendix. These health laws are enforced

notwithstanding compulsory attendance laws which are in effect in all the states.

The wording of the statutes varies from state to state. Indiana, for example, requires the board of health to certify that a person with a communicable disease is no longer infectious to others. Other statutes, such as that in Virginia, do not discuss "infectiousness" but merely prohibit school officials from admitting to school persons with diseases which have been declared by the state to be communicable.

Among the states with statutes regarding the health of school employees, a continuing requirement for certification of good health and freedom from disease is commonplace. Valente, Education Law Public and Private, 234 (1985). Generally this type of provision has been upheld by

the courts. King-Smith v. Aaron, 455 F.2d 378 (3rd Cir. 1975); Board of Trustees v. Porini, 263 Cal. App.2d 784 (1968).

At least 25 of the states and the District of Columbia require a medical certification that an employee is free from tuberculosis or other communicable disease. E.g., Alaska Stat. § 18.15.145; Cal. Educ. Code §§ 44839, 49406; Me. Rev. Stat. Ann. tit. 20A, § 6551; Mass. Gen. Laws Ann. Ch. 71, § 55A; N.M. Stat. Ann. § 22-10-10; Pa. Stat. Ann. tit. 24, § 12-1209. See Appendix.

Another five states do not specifically require certification that the employee is free from communicable diseases but do make good physical health a condition of employment. Conn. Gen. Stat. Ann. § 10-207; Mont. Rev. Code Ann. §20-4-106(b); Neb. Rev. Stat. §79-1247.06;

Nev. Rev. Stat. § 391.312(f); Utah Code Ann. § 53-2-25; . Approximately 20 states require employees to undergo examinations subsequent to initial employment either periodically or as ordered by the school board. Most states that require subsequent physical examinations do so on an "as needed" rather than periodic basis. However, certain states still require periodic check ups for their high risk employees, e.g., Ark. Stat. Ann. § 80-1210; Me. Rev. Stat. Ann. tit. 20A, § 6551; and some require periodic exams for all their employees. E.g., Cal. Educ. Code § 493406; W.Va. Code § 16-3-4a. In addition, nine states provide that no teacher can be employed while in the contagious stage of tuberculosis.

B. Courts consider infectivity of the disease in Section 504 cases involving students with communicable diseases.

Several cases address the issue of the applicability of Section 504 to students with communicable diseases. New York State Assn. for Retarded Children, Inc. v. Carey, 466 F. Supp. 479 (E.D.N.Y. 1978), involved the question of whether school officials violated Section 504 by isolating from the rest of the school community retarded children who were carriers of the hepatitis B virus. The court noted that the school board should not be required to "clearly demonstrate existence of a significant health risk," but in this case there was no showing that the carriers posed a health risk to others, because the disease is "transmitted primarily by blood-to-blood contact, by means of transfusion of

injected blood...and may also be transmitted through body fluids other than blood, such as saliva or semen." Id at page 489, n.1.

Other court decisions have upheld school officials' decisions refusing to admit students with hepatitis, based on the transmissibility of the disease in the particular individual. In an unreported decision out of the U.S. District Court of Maryland, Ely v. Howard County Board of Education, 3 E.H.L.R. 553:288 (D. Md. 1982), the court upheld the emergency suspension and ultimate exclusion from a special school for the handicapped of a retarded student with severe learning disabilities who had been identified as a carrier of the hepatitis B virus.

In that case experts testified that the child drooled constantly and that,

because saliva carries the virus, there existed a "high risk" of infection through contact of other students or staff with the child's saliva. Other evidence also showed that a member of the school staff had contracted hepatitis, apparently from this child.

The court acknowledged the right of the child to an education "in the least restrictive environment" and the hardship and injury he would suffer by being excluded from school. But it contrasted the child's hardship with the hardship that would be suffered by the board of education (representing other students and school staff) if the child were placed in school, and concluded that the two "are of a different degree and kind."

"The former is undoubtedly a temporary setback to the child in his

tragic circumstances," the court wrote. "The latter could be life threatening at the worst, and life debilitating if not life threatening."

The court then continued with a discussion of the question of "risk"--a question which always is present in these cases.

> While it may well be that the hygenic precautions, if rigorously followed, would reduce the risk to a minimal one, the defendant's expert believed that the risk was nevertheless significant.
>
> After hearing the evidence the court concludes that the risk is significant to the health and safety of the staff and the other students and believes the probability that [the student will infect a staff member or a student] is so great that the court cannot, in good conscience, say that the risk to the defendants would not outweigh the injury to the plaintiff.

It should also be emphasized that,

unlike hepatitis B, AIDS and other diseases which have been the subject of recent cases involving students, tuberculosis is highly infectious in so-called "casual" settings such as the classroom. The lower court in the instant case recognized that fact.

In each case, of course the most difficult question will be that posed to the medical experts: whether the disease in the affected individual is reasonably capable of being spread to others in the context of the school environment and, if so, how long the student or employee must be kept out of the classroom. The burden should always be placed on the handicapped individual to prove lack of infectiousness.

V. REASONABLE ACCOMMODATION, IF AUTHORIZED AT ALL BY SECTION 504, DOES NOT REQUIRE AN EMPLOYER TO PLACE IN ANOTHER POSITION, A PERSON UNQUALIFIED FOR HIS/HER CURRENT POSITION.

The most disturbing part of the court of appeals decision is its directive to the district court to determine first, if Ms Arline is "otherwise qualified" for her present job and, if not, what other jobs the school district could devise for which she would be qualified. This elevates the "reasonable accommodation" requirement from a means of making minor adjustments to qualify the person for the current position, to a separate requirement that the employer make affirmative efforts to create a postion for the handicapped person when he or she is not qualified for the position for which he or she is being considered.

The statutory language of section 504

contains no requirement that employers provide "reasonable accommodation" for the handicapping condition of an employee or applicant. However, the Department regulation, promulgated under Section 504, does contain such a requirement.

The Department of Health, Education and Welfare (now the Department of Education and Department of Health and Human Services) took its "reasonable accommodation" requirement from a similar requirement in the Department of Labor regulation under section 503 of the Rehabilitation Act of 1973 (applies to federal contractors). HEW noted, in Appendix A to its regulation, that: "Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose

is the same, and the federal government's policy in implementing the two sections will be uniform." 34 C.F.R. 104, Appendix A, Subpart B, Section 16.

As this Court has noted "an agency's interpretation of the statute under which it operates is entitled to some deference, [however] 'this deference is constrained by our obligation to honor the clear meaning of a statute as revealed by its language, purpose and history.'" (citation omitted) Southeastern Community College v. Davis, 442 U.S. 403, 411. A serious question arises as to whether Section 504 authorizes inclusion of a "reasonable accomodation" provision in the regulation. First, as this Court has noted, the statute does not authorize any regulation under Section 504, except as to employees and contractors of the federal government.

Id at page 413, n. 11. Second, even if authorization could be implied, the authorization would not extend to encompass affirmative requirements such as that mandated by the lower court.

In addition to the explicit authorization in Section 503 for a government regulation implementing the provisions of the law, another important distinction between Section 503 and Section 504 lays in question the validity of the Department of Education's "reasonable accommodation" requirement. Unlike Section 504, which prohibits discrimination, Section 503 requires government contractors to "take affirmative action to employ and advance in employment qualified handicapped individuals....", 29 U.S.C 793(a). Thus, while a requirement relating to

"reasonable accommodation" under Section 503, would be appropriate in order to implement the Congressional intent relating to "affirmative action", such a requirement may not be appropriate under a non-discrimination statute such as Section 504.

As this Court pointed out in Southeastern Community College v. Davis, supra at 411, "a comparison of [sections 501, governing Federal Government employment, 503 and 504] demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so."

If, indeed, the Department of Health, Education and Welfare is held to have had the authority to adopt a "reasonable

accommodation" requirement, that authorization could only extend as far as a means of meeting Section 504's non-discrimination requirement. There is no authority in the law which supports a department regulation making an affirmative obligation to "find a job" somewhere in the employer's organization for a handicapped person.

Like the court of appeals below, we sympathize with Ms. Arline and the situation she finds herself in through no fault of her own. But, Section 504 is a non-discrimination act, not a law guaranteeing employment to handicapped persons. No where in the Act or in the regulation is there a requirement that the employer either create a job for the handicapped person, which meets the person's qualifications, or place the

person in a different job than that for which they have applied or have held in the past.

Section 104.12(b) of the Department of Education regulation provides examples of methods of accommodation which the Department believed would be "reasonable." All of the examples refer to restructuring the qualification requirements of the job for which the handicapped employee is being considered, providing equipment to assist the employee in qualifying for the job or making the employer's facilities accessible to the job applicant. No where is there any indication that the Department intended to require the employer to consider the person for a different job, in the event accommodation cannot be made in the first job.

> "(b) Reasonable accommodation may include: (1) making

> facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions."

The appendix to the regulation provides additional guidance as to the department's definition of "reasonable accommodation."

> "Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons." 34 C.F.R. 104, App. A, Subpart B, Section 16.

Even the Department of Labor regulation 41 C.F.R. 60-741. implementing Section 503, which as we have said

requires "affirmative action," does not carry the definition of "reasonable accommodation" as far as the lower court. The regulation provides in part, as follows:

> "'Qualified handicapped individual' means a handicapped individual as defined in section 60-741-2 who is capable of performing a particular job with reasonable accommodation to his or her handicap."

Significantly, the accommodation requirement applies only to a "particular job." The implementing regulations of Section 501 of the Rehabilitation Act includes a similar qualifier on the scope of the "reasonable accommodation" requirement; this restriction appears even though section 501, like Section 503, contains an affirmative action requirement. Under Section 501, the regulation regarding the definition of

"qualified handicapped person" provides as follows:

> "Qualified handicapped person means with respect to employment, a handicapped person who, with or without reasonable accommodation can perform the essential functions of the position in question without endangering the health and safety of the individual or others...." 29 C.F.R. section 16134.702(f).

The key phrase to note in this definition restricts application of the accommodation requirement to the "position in question."

Thus, it is apparent that neither the Department of Labor nor the Department of Health, Education and Welfare intended by their "reasonable accommodation" requirements to mandate that handicapped employees who are <u>not</u> qualified for the position be provided a different one. In the instant case, the "particular job" is the position which Ms. Arline held as an

elementary-school teacher. Since her disability renders her unqualified for the position of elementary-school teacher, the school district was authorized to terminate her employment.

VI. ALLOWING A PERSON WITH A CONTAGIOUS DISEASE TO REMAIN IN THE CLASSROOM SUBJECTS A SCHOOL DISTRICT TO POTENTIAL TORT LIABILITY

In each case where a school district knowingly allows a student or employee with a contagious disease to remain in the classroom, there exists the potential of a suit in tort by another who contracts the disease from the infected person.

A number of such cases arose at a time when diseases such as tuberculosis and smallpox were far more prevalent in this country. These cases hold employers or landlords liable to persons who have contracted diseases from others on the premises. The courts have held that the

defendant knew or should have known of the danger and had a duty to warn others of that danger. See, e.g., Earle v. Kuklo, 98 A.2d 1097 (N.H. App. Div., 1953); Kleigel v. Aitken, 69 N.W. 67 (Wisc. 1896); Gilbert v. Hoffman, 23 N.W. 632 (Iowa 1885).

Employers have even been held to be negligent for failure to take prophylactic measures to clean up the premises after removing an infected person from the premises. For example, a case in Minnesota involved a school teacher who alleged that she contracted tuberculosis because the school district had not properly cleaned and disinfected the classroom after the teacher's predecessor left her job due to tuberculosis. Although dismissing the action because of the school district's immunity, the court

held that the school district had been negligent. Bang v. Independent School District No. 27, 225 N.W. 499 (1929).

CONCLUSION

Amicus submits that Ms. Arline is "handicapped" under Section 504 of the Rehabilitation Act of 1973. The school district, as an important part of its duty to protect the students within its charge, requires that teachers must be physically capable of doing the job. The uncontroverted medical testimony here indicated that Ms. Arline was capable of transmitting her tuberculosis infection to the students in the context of the classroom. Since she cannot meet a valid criterion for her position, she is not "otherwise qualified" for the job.

The court of appeals remanded the case back to the district court for a

determination as to whether the school district could "reasonably accommodate" Ms. Arline's lack of qualification for elementary-school teacher, by finding another job in the district for her that would not require contact with young children.

Even assuming that Ms. Arline is not infectious to older individuals - a contention not supported by the record - that does not authorize a court to direct the school district to find other employment for Ms. Arline.

Section 504 is a non-discrimination statute. If the district does not have a practice of moving employees from position to position, when they are not qualified for the position which they hold or for which they apply, it is not discriminatory to hold Ms. Arline to the same standard.

The "reasonable accommodation" requirement, if valid at all, is valid only to the limited extent of making minor accommodations for the handicap. Even under Section 503, which requires affirmative action, a requirement to create a position for a handicapped person would be unauthorized by the law.

Under modern therapy, if avidly followed by the patient, most persons who contract tuberculosis can be completely cured of the disease. Others with drug-resistant organisms may continue to be infectious. Infectiousness of Tuberculosis, American Review of Respiratory Disease, Vol. 96, No. 4, October 1967. Ms. Arline may be one of those persons. However, it is beyond the scope of the law and of good public policy to place the school district in the

position of either risking the health of the students in Ms. Arline's classroom by allowing her to remain in her present position or, on the other hand, to create a position for her elsewhere in the district.

Respectfully submitted,

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APPENDIX

STATUTORY REQUIREMENTS ON SCHOOL HEALTH

	Pupils			Teachers*	
	PHYSICAL EXAM.	IMMUNIZATION	FREE FROM COMM. DISEASE	FREE FROM TUBERCULOSIS	FREE FROM COMM. DISEASE
AL	X	X	X		
AK	X	X[1]	X	X[4]	
AZ		X	X	X[4,5]	
AR		X	X	X[4]	X
CA	X	X[1]	X	X[3,4]	X
CO		X	X		
CT	X	X	X		
DE			X		
DC		X	X[2]		X[2]
FL	X	X			
GA		X			

State	Pupils PE	IM	CD	Teachers* TB	CD	
HI	X	X				
ID		X		X 3,4,5	X	
IL	X	X		X 4	X	
IN	X	X				
IA			X			
KS	X	X		X 4	X	
KY	X	X	X			
LA	X	X	X			
ME		X	X	X 4		
MD		X 1	X	X 4,5		
MA	X	X	X	X 4,5		
MI	X	X				
MN		X		X 5	X	
MS		X	X	X 4,5	X	
MO	X	X	X			
MT		X	X			
NE	X	X	X			
NV	X	X	X			

State	Pupils PE	IM	CD	Teachers* TB	CD
NH	X	X	X		
NJ	X	X	X		
NM		X			X 5
NY	X	X	X		
NC		X	X	X 4	X
ND	X	X	X		
OH	X	X	X		
OK	X	X	X		
OR		X	X		X 5
PA	X	X	X	X 3	X
RI	X	X			
SC		X	X	X 4	
SD	X	X	X	X 4	X
TN		X			X 4,5
TX	X	X		X 4	
UT	X	X		X	
VT	X	X			
VA		X		X 4	

	Pupils			Teachers*	
State	PE	IM	CD	TB	CD
WA		X	X		X
WV	X	X	X	X$_4$	
WI		X	X	X$_4$	
WY		X	X		
Total:	**29**	**49**	**35**	**21**	**15**

1 Discretionary with school district
2 General public health statute
3 Teacher certification prerequisite
4 Additional tests or exams required on a periodic basis or when deemed necessary
5 Requires exclusion from school

TABLE OF CITATIONS

Pupils

Physical Exams

Ala. Code §§ 16-29-1

Alaska Stat. § 14.30.070

Cal. Educ. Code §§ 49-450; 49-452.5

Conn. Gen. Stat. Ann. § 10-206

Fla. Stat. Ann. § 232.0315

Hawaii Rev. Stat. § 298-47

Ill. Ann. Stat. Ch. 122, § 27-8-1

Ind. Code Ann. § 20-8.1-7-3

Kansas Stat. Ann. § 72-5209

Ky. Rev. Stat. § 158.036

La. Rev. Stat. § 17:156

Mass. Gen. Laws Ann. ch. 71, § 57

Mich. Comp. Laws Ann. § 15.41177

Mo. Ann. Stat. § 192.070

Neb. Rev. Stat. § 79, 444

Nev. Rev. Stat. § 392.420

N.H. Rev. Stat. Ann. § 200:32

Physical Exams

N.J. Rev. Stat. § 18A: 40-4

N.Y. Educ. Law §§ 903; 904

N.D. Cent. Code § 15-47-22

Ohio Rev. Code Ann. § 3313.71

Okla. Stat. Ann. tit. 70, § 11-104

PA. Stat. Ann. tit. 24, § 14-1402

R.I. Gen. Laws § 16-21-9

S.D. Codified Laws Ann. § 13-28-5

Tex. Educ Code Ann. § 11.20

Utah Code Ann. § 53-22-2

Vt. Stat. Ann. tit. 16, § 1384

W.VA. Code § 18-5-22

Student Immunization

Ala. Code § 16-30-4

Alaska Stat. § 14.30.125

Ariz. Rev. Stat. Ann. § 15-803

Ark. Stat. Ann. § 8-1548

Cal. Educ. Code § 49-452.5

Student Immunization

Colo. Rev. Stat. § 25-4-902

Conn. Gen. Stat. Ann. § 10-20-4a

D.C. Code Ann. § 31-502

Fla. Stat. Ann. § 232.032

Ga. Code Ann. § 20-2-771

Hawaii Rev. Stat. § 298-42

Idaho Code § 39-4801

Ill. Ann. Stat. ch. 122, § 27-8.1

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Kansas Stat. Ann. § 72-5209

Ky. Rev. Stat. § 158.035

La. Rev. Stat. Ann. § 17:170

Me. Rev. Stat. Ann. tit. 20A, § 6351

Md. Educ. Code Ann. § 7-402

Mass. Gen. Laws Ann. ch. 76, § 15

Mich. Comp. Laws Ann. § 15.41117

Minn. Stat. Ann. § 123.70

Miss. Code Ann. § 37-7-301

Mo. Ann. Stat. § 167.181

Student Immunization

Mont. Code Ann. § 40-5-403

Neb. Rev. Stat. § 79, 444.01

Nev. Rev. Stat. § 392.435

N.H. Rev. Stat. Ann. § 200:38

N.J. Rev. Stat. § 18A: 40-13/22

N.M. Stat. Ann. § 24-5-2

N.Y. Educ. Law § 2164

N.C. Gen. Stat. § 130A-144.152.155

N.D. Cent. Code § 23-07-17.1

Ohio Rev. Code Ann. § 3313.671

Okla Stat. Ann. tit. 70, § 1210.191

Or. Rev. Stat. § 433.267

PA Stat. Ann. tit. 24, § 1210.191

R.I. Gen. Laws § 16-38-2

S.C. Code Ann. § 44-29-180

S.D. Codified Laws Ann. § 13-28-7.1

Tenn. Code Ann. § 49-6-5001

Tex. Educ. Code Ann. § 2.09

Utah Code Ann. § 26-6-22

Student Immunization

Vt. Stat. Ann. tit. 18, § 1121

VA. Code § 22.1-270

Wash. Rev. Code Ann. § 28A-31-114

W.VA. Code § 16-3-4

Wis. Stat. Ann. § 140.05

Wyo. Stat. § 21-4-309

Student Communicable Diseases

Ala. Code § 16-29-1

Alaska Stat. § 14.30.045(4)

Ariz. Rev. Stat. Ann. § 15-803

Ark. Stat. Ann. § 80-1516

Cal. Educ. Code § 49451

Colo. Rev. Stat. § 22-33-106

Conn. Gen. Stat. Ann. § 10-210

Del. Code Ann. tit. 14, § 2707

D.C. Code Ann. § 31-502

Iowa Code Ann. § 282.3

Ky. Rev. Stat. § 158.160

LA. Rev. Stat. Ann. § 17:226

Student Communicable Diseases

ME. Rev. Stat. Ann. tit. 20A, § 6301

Md. Educ. Code Ann. § 7-30(2)

Mass. Gen. Laws Ann. ch. 71, § 55A

Miss. Code Ann. § 37-7-301

Mo. Ann. Stat. § 167.191

Mont. Code Ann. § 20-5-405

Neb. Rev. Stat. § 79-4, 177

Nev. Rev. Stat. § 439.510

N.H. Rev. Stat. Ann. § 200:39

N.J. Rev. Stat. § 18A: 40-8

N.Y. Educ Law § 906

N.C. Gen. Stat. § 130A- 17B

N.D. Cent. Code § 23-07-16

Ohio Rev. Code Ann. § 3313.55

Okla. Stat. Ann. tit. 70, § 1210.194

Or. Rev. Stat. § 433.260

PA. Stat. Ann. tit. 53, § 37306

S.C. Code Ann. § 44-29-200

S.D. Codified Laws Ann. § 13-28-7.3

Student Communicable Diseases

Wash. Rev. Code Ann. § 28A.31.010

W.VA. Code § 18A-5-1

Wis. Stat. Ann. § 143.12

Wyo. Stat. § 21-4-307

Teachers

Teachers Tuberculosis

Alaska Stat. § 18.15.145

Ariz. Rev. Stat. Ann. § 15-206

Ark. Stat. Ann. § 80-1210

Cal. Educ. Code § 49406

Idaho Code § 33-1202(3)

1973 Ill. Laws 78-344, § 2

Kansas Stat. Ann. § 72-5213

ME. Rev. Stat. Ann. tit. 20A, § 6551

MD. Educ. Code Ann. § 7-404

Mass. Gen. Laws Ann. ch 71, § 55A

Minn. Stat. Ann. § 125.04

Miss. Code Ann. § 37-11-13

N.C. Gen. Stat. § 115C-323

Teachers Tuberculosis

PA. Stat. Ann. tit. 24, § 12-1209

S.C. Code Ann. § 44-29-150

S.D. Codified Laws Ann. § 13-43-3.1

Tex. Rev. Civ. Stat. Ann. art. 4477-12

Utah Code Ann. § 26-6-9

VA. Code § 22.1-300

W.VA. Code § 16-3-4a

Wis. Stat. Ann. § 143.16, 143.17

Teachers Communicable Diseases

Ark. Stat. Ann. § 80-1210

Cal. Educ. Code § 44839

D.C. Code Ann. § 6-119

Idaho Code § 33-1202(3)

1973 Ill. Laws 78-344, § 2

Kansas Stat. Ann. § 72-5213

Minn. Stat. Ann. § 125.17(4)

Miss. Code Ann. § 37-11-17

N.M. Stat. Ann. § 22-10-10

Teachers Communicable Diseases

N.C. Gen. Stat. § 115C-323

Or. Rev. Stat. § 433.255

PA. Stat. Ann. tit. 24, § 12-1209

S.D. Codified Laws Ann. § 13-43-3

Tenn. Code Ann. § 49-1302

Wash. Rev. Code Ann. § 28A.31.010

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No. 85-1277

In The
Supreme Court of the United States
October Term, 1985

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, *et al.*,
Petitioners,

v.

GENE H. ARLINE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA JOINED BY MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW YORK AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

Amici States, pursuant to Supreme Court Rule 36.4, have filed this brief in support of respondent to emphasize their concern that discrimination against persons with communicable diseases remain covered as discrimination on the basis of handicap, precluded by Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794.

As with other forms of discrimination against the disabled, discrimination against persons with communicable diseases frequently results from irrational fears, mistaken assumptions and unfounded stereotypes. Often persons who have or carry communicable diseases pose no threat to others. Premature termination from productive employment deprives such persons of the ability to provide for themselves and deprives society of their productivity, creating a double burden on the State. In addition to employment discrimination, such persons may face discrimination in housing, health care or benefit programs. Amici States have an interest in protecting their inhabitants who suffer from communicable diseases from such arbitrary discrimination.

In addition, some of amici States have declared all or some communicable diseases to be protected as physical handicaps under state anti-discrimination laws. The exclusion of communicable diseases from coverage under federal law, as proposed in the briefs of Petitioner and the Solicitor General, could adversely affect the accomplishment of the goals of these state laws.

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SUMMARY OF ARGUMENT

This case involves the application of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, to discrimination against persons with communicable dis-

eases. A proper resolution requires an understanding of both communicable diseases and the statutory framework for redressing discrimination against disabled persons.

Communicable diseases exhibit extreme variety as to cause, mode of transmission, severity and duration. Generalizations about communicable diseases as a group or even about the "contagiousness" of particular diseases are often difficult.

Section 504 prohibits the exclusion of any "qualified handicapped person" from any program receiving federal assistance. It covers federally assisted housing, education, transportation, health care and benefit programs as well as employment. It was enacted with a broad remedial purpose and has been construed to cover a wide variety of conditions.

There is no basis in legislative history, case law or logic for excluding communicable diseases from coverage as handicaps under Section 504. Communicable diseases are physiological disorders affecting one or more body systems, which may substantially limit, or may be perceived as substantially limiting, major life activities including the ability to circulate freely with others, and therefore fit within the statutory and regulatory definition of handicap. It is consistent with both legislative history and case law interpreting Section 504 to construe the requirement of "handicap" broadly and then carefully evaluate whether a particular person is qualified for the program or position in question. The notion that a particular characteristic of a handicapping condition such as "contagiousness" may be separated out and excluded from coverage finds no support in case law or legislative history, and is antithetical to the broad, remedial purposes of the Act. Protection against irrational and medically unjustifiable discrimination is particularly necessary in the case of diseases that create apprehension in the general public.

To be protected under the Act, a handicapped person must also be found to be qualified to participate in the program in question. Whether a person with a communicable disease which is, or is perceived to be, "contagious" should be excluded from a federally assisted program is part of the determination whether the handicapped person is "otherwise qualified." Blanket rules regarding particular diseases are inappropriate; each case should be evaluated on an individual basis, in the same manner as other handicapping conditions which pose a risk of harm to others. Determinations of risk must be based on reasonable medical judgments founded on the available medical evidence. Because the record does not indicate the trial court performed the required analysis in the present case, the case should be remanded for reconsideration in light of the principles enunciated above.

A construction of Section 504 which includes communicable diseases will neither interfere with public health efforts to control communicable diseases nor upset the balance of state-federal relations. On the contrary it is consistent with the application of federal anti-discrimination law to a wide variety of state regulatory programs.

ARGUMENT

I. A PERSON WITH A COMMUNICABLE DISEASE IN A STAGE WHICH IS, OR IS PERCEIVED TO BE, TRANSMISSIBLE IS HANDICAPPED WITHIN THE MEANING OF SECTION 504.

This case of first impression, involving the discharge of an elementary school teacher with tuberculosis, presents the question whether communicable diseases are covered as "handicaps" within the meaning of Section 504 of the

Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. The District Court held that "contagious" diseases were not included in the definition of "handicapped person" in Section 504 (Pet. App. C., at 14). Petitioner reiterates this argument before this Court, supported by the Solicitor General, on behalf of the Attorney General and the United States as employer, contending that discrimination based on "contagiousness," or the fear thereof, is not unlawful. Brief of United States at 1-2, 15. The American Medical Association, the American Public Health Association and these amici States seriously dispute these contentions.

A correct determination regarding the scope of Section 504 requires an analysis of both the underlying medical concepts and the relevant statutory framework.

A. Communicable Diseases.

As the brief of the American Medical Association notes, the terms "infectious," "contagious," and "communicable" are often used imprecisely. Brief of AMA at 2, n. 2. "Communicable" diseases are those which are capable of being transmitted from person to person, at least at some stage of the disease. Communicable diseases are caused by infection by microorganisms such as bacteria or viruses. Transmission can occur by direct or indirect contact, by ingestion of contaminated food or water, or by insect vectors. "Communicable" disease is the generally accepted medical term for all transmissible diseases. *Stedman's Medical Dictionary* 315 (5th ed., 1982). "Contagion" or "contagiousness" denotes transmission by contact with the sick. It is generally a lay, and not a medical, term which antedates the modern conception of infectious diseases. *Ibid.* In fact, while the notion that certain diseases were capable of transmission by human con-

tact has been widespread among lay people since at least biblical times, the communicability of certain diseases did not become generally accepted in the medical profession until the early part of this century, concurrent with the acceptance of microorganisms as the cause of infectious diseases. C. Winslow, *The Conquest of Epidemic Disease* 181-183, 309-310, 367-376 (1943). With the understanding that infectious diseases were specific entities, each caused by a particular microorganism with specific modes of transmission, communicable diseases could be combatted by public health measures aimed at specific modes of transmission, such as disinfection of public water supplies and eradication of mosquitoes, and by methods of medical treatment that would neutralize or eliminate the disease causing organism, such as immunization and treatment with antibiotics. The control of communicable diseases in this century has thus moved from an emphasis on quarantine and isolation to public education and research into vaccines and disease fighting drugs. *Id.*, 364-366; P. Wehrle & F. Top, *Communicable and Infectious Diseases* (Ninth ed., 1981) 19-27, 29. Control of communicable diseases today depends on a precise understanding of the etiology and epidemiology of each disease. Given a proper course of treatment, individuals with communicable diseases rarely need to be isolated, and need to be restricted only from those particular activities by which the disease may be spread during the period when the disease can be transmitted. *See, e.g.*, Brief of AMA at 6-7.[1] The prevention of com-

1. In California's public health scheme complete isolation is required only for bubonic plague, cholera and diphtheria. For other diseases regulations may prescribe modified isolation with some restrictions on contacts or protection from insects. Specific instruction from a health officer regarding avoidance of transmission is required for tuberculosis and venereal disease. Relatively few diseases require restrictions on contacts. *See*, Cal. Admin. Code, Title 17, §§ 2550-2640.

(Continued on following page)

municable disease thus depends above all on accurate and effective public education about personal hygiene and the avoidance of disease transmission, as well as medical research into methods of treatment and immunization. C. Winslow, *The Conquest of Epidemic Diseases* at 364; P. Wehrle & F. Top, *Communicable and Infectious Diseases* at 20.

B. Statutory Framework.

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, provides in part that:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

"Handicapped individual" is defined in Section 7 of the Act, 29 U.S.C. § 706(7)(B), as:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(Continued from previous page)

In New York, health officials may require complete isolation in certain cases of communicable disease and when necessary to protect the public health. N.Y. Pub. Health Law § 2100 *et seq.* (McKinney 1985). Specific instructions exist for care, maintenance and conditions of isolation for typhoid fever. N.Y. Pub. Health Law § 2151 (McKinney 1985). Instructions regarding avoidance of transmission are required for tuberculosis and venereal disease. N.Y. Pub. Health Law §§ 2200 *et seq.*; 2300 *et seq.* (McKinney 1985). *See also* A. Benensen, *Control of Communicable Diseases in Man* (14th ed., 1985).

Regulations adopted by the Department of Health and Human Services found at 45 C.F.R. § 84.3(j)(2)(i) (1985) state that "physical or mental impairment" means:

> (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The regulations further amplify "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. § 84.3(j)(2)(ii) (1985).

Section 504 thus prohibits, in the context of this case, discrimination against persons who have or are regarded as having a "physiological disorder or condition" affecting a body system which "substantially limits" one or more major life activities.

Congress enacted the Rehabilitation Act with a broad remedial purpose. *See Consolidated Rail Corp. v. Darrone,* 465 U.S. 624 (1984); S. Rep. No. 1297, 93rd Cong., 2d Sess. 50 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388-6390, hereafter cited as S. Rep. No. 1297. The intent of the Act was to promote the integration of disabled persons into the mainstream of life and to prevent their unnecessary isolation. S. Rep. No. 890, 95th Cong., 2d Sess. 39 (1978).

Section 504 was "intended to be part of the general corpus of discrimination law," *New York State Ass'n for Retarded Children v. Carey,* 612 F.2d 644, 649 (2d Cir. 1979), like Title VI and VII of the Civil Rights Act of

1964, 42 U.S.C. § 2000d and § 2000e, Pub. L. 88-352, 78 Stat. 252. It was explicitly patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, Pub. L. 92-318, 86 Stat. 373. S. Rep. No. 1297 at 6390.

Although the Act originally contained a generally applicable definition of "handicapped individual" which focused on employability, now 29 U.S.C. § 706(7)(A), Pub. L. No. 93-112, § 7(6), 87 Stat. 361, Congress in 1974 added another definition, applicable to Section 504, which expands the focus beyond employability in order to fulfill Congress' broad remedial intent. 29 U.S.C. § 706(7)(B); S. Rep. No. 1297 at 6388-6390. The Act precludes discrimination in a broad range of federally financed programs including education and employment. *Consolidated Rail Corp. v. Darrone,* 465 U.S. at 632; 45 C.F.R. Pt. 84, App. A, Subpt. A (1985). It also applies to hospitals and other health care facilities, and public assistance programs. *Bowen v. American Hospital Ass'n,* 106 S.Ct. 2101 (1986); S. Rep. No. 1297 at 6388; 45 C.F.R. § 84.51; 45 C.F.R. Pt. 84, App. A (1985).

In addition to the broad range of programs to which the Act applies, it applies to a broad array of conditions. When Congress expanded the definition of "handicapped" in 1974, it included not just traditional handicaps such as blindness but all physical and mental impairments which limit one's major life activities. 29 U.S.C. § 706(7)(B). Both the regulations adopted by the Department of Health and Human Services and case law interpreting Section 504 have determined that it applies to chronic and non-chronic conditions and diseases. *See, e.g.,* 45 C.F.R. Pt. 84, App. A (1985); 41 Fed. Reg. 20298 (1976); *Pushkin v. Regents of the University of Colorado,* 658 F.2d 1372 (10th

Cir. 1981) (multiple sclerosis); *Drennon v. Philadelphia General Hospital,* 428 F.Supp 809 (E.D. Pa. 1977) (epilepsy); *Doe v. Region 13 Mental Health-Mental Retardation Commission,* 704 F.2d 1402 (5th Cir. 1983) (anxiety, depression and insomnia); *Bentivegna v. U.S. Dept. of Labor,* 694 F.2d 619 (9th Cir. 1982) (diabetes mellitus); *Treadwell v. Alexander,* 707 F.2d 473 (11th Cir. 1983) (heart condition including coronary by-pass and use of pacemaker); *City of Cleburne v. Cleburne Living Center,* 105 S.Ct. 3249, 3256 (1985) (mental retardation).[2]

The only qualification Congress made in this otherwise broad definition concerns persons disabled by drug or alcohol abuse. In 1978 Congress clarified that Section 504 did not require employment of persons "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B). Recovered alcoholics, or alcoholics in non-job related programs are covered. *E.g., Tinch v. Walters,* 765 F.2d 599 (6th Cir. 1985).

In addition, the Act clearly excludes from its coverage conditions which are not related to a physical or mental disorder, such as environmental, cultural and economic disadvantages. 45 C.F.R. Pt. 84, App. A (1985).

Finally, it should be observed that a determination that one is a "handicapped individual" does not ensure a successful suit. That is only the first part of a four part requirement for stating a cause of action under Section 504. In addition, Section 504 requires a finding that the

2. 29 U.S.C. § 706(7)(B)(ii) specifically includes persons who have recovered from an impairment.

person is "otherwise qualified" for the position, program, or benefit involved; that the discrimination was based on handicap and not on lack of qualifications; and that the program receives federal financial assistance. *Doe v. New York University,* 666 F.2d 761, 774-775 (2d Cir. 1981).

Thus, in addition to demonstrating that he or she has, or is perceived as having, the requisite physical or mental condition which substantially limits certain activities, a successful plaintiff in a Section 504 case must also show that despite such handicap he or she is qualified for the federally funded position, program or benefit and was excluded "solely by reason of handicap" and not on some legitimate criterion of eligibility. Where, as a result of the handicapping condition, the disabled person would be unable to perform the job functions, or otherwise participate adequately in the program in a manner which does not endanger others, he or she is not "otherwise qualified" and exclusion is not unlawful. *Southeastern Community College v. Davis,* 442 U.S. 397 (1979); *Doe v. New York University,* 666 F.2d at 777-779.[3]

It is generally through the "otherwise qualified" requirement that a determination of the validity of plaintiff's exclusion is made. The first requirement, being a "handicapped individual," has generally not been contested in Section 504 cases. *See de la Torres v. Bolger,* 781 F.2d 1134, 1137 (5th Cir. 1986). Individuals have been held

3. In other words, in the employment context, a plaintiff must be sufficiently impaired to be considered handicapped but not so impaired as to be unable to perform the functions of the job. Several courts have noted this "Catch 22." *Tudyman v. United Airlines,* 608 F.Supp. 739, 741-744 (C.D. Cal. 1984); *Doe v. Region 13 Mental Health-Mental Retardation Commission,* 704 F.2d at 1408, n. 6. A plaintiff who insists he or she is not impaired by a handicapping condition risks a determination that he or she is not a handicapped person. *E.g., Jasany v. United States Postal Service,* 755 F.2d 1244, 1250 (6th Cir. 1985).

not to be handicapped only where the condition was not properly considered a "disorder," such as lefthandedness, *de la Torres v. Bolger,* 781 F.2d at 1138, or not an "impairment," *Jasany v. United States Postal Service,* 755 F.2d 1244, 1250, n. 6 (6th Cir. 1985) (cross-eyed condition); *Tudyman v. United Airlines,* 608 F. Supp. 739, 746 (C.D. Cal. 1984) (excessive muscularity induced by bodybuilding); or not a "substantial limitation," *Oesterling v. Walters,* 760 F.2d 859, 861 (8th Cir. 1985) (varicose veins).

In short, to protect both individual and broad public interests, and to effectuate the remedial purposes of the Act, both congressional intent and case law support a broad construction of "handicapped" and careful attention to the individual's condition in determining whether he or she is "otherwise qualified."[4]

C. A Person With a Communicable Disease Which Is Or Is Perceived To Be "Contagious" May Be Handicapped Within The Meaning of Section 504 And Its Implementing Regulations.

1. Communicable Diseases May Be Handicaps Within the Meaning of Section 504.

Communicable diseases fall neatly within the framework of the Act, and a construction favoring their inclusion would effectuate the broad, remedial purpose envisioned by Congress for the Act, as the Court of Appeals determined. *Arline v. School Board of Nassau County,* 772 F.2d 759, 764 (11th Cir. 1985). A person with tubercu-

4. It should be noted in this connection that there are many instances covered by Section 504 in which the person's "qualifications" are relatively unimportant, such as discrimination in federally-assisted housing, transportation, health services, public assistance and other benefit programs. *Alexander v. Choate,* 105 S.Ct. 712 (1985); *Bowen v. American Hospital Ass'n,* 106 S.Ct. at 2114, S. Rep. No. 1297, at 6388-6391.

losis, or any other communicable disease, who is excluded on that basis from a covered program is "handicapped" within the meaning of the Act.

As stated above, a "handicapped individual" is defined as one who has, has had, or is perceived to have, a "physical or mental impairment which substantially limits one or more of such person's major life activities." 29 U.S.C. § 706(7)(B). "Physical impairment" means, in this context, "any physiological disorder or condition" affecting one or more specified body systems. 45 C.F.R. § 84.3(j)(2)(i) (1985).

Invasion of the body by a disease causing microorganism is a physiological disorder. Communicable diseases may affect a specific body system, such as tuberculosis of the lungs. In general they affect the hemic and lymphatic system. Infectious diseases thus satisfy the definition of "impairment." 29 U.S.C. § 706(7)(B); 45 C.F.R. § 84.3 (j)(2)(i) (1985).[5] Such diseases may substantially limit major life activities by debilitating the individual generally or by affecting specific organs or systems.[6] Whether and to what degree the individual is "substantially limited"

5. As the American Medical Association and others point out, it is the disease or condition that constitutes the "impairment," not the limiting effects of the disease. *E.g.*, Brief of AMA at 24.

6. The length of time a person is impaired is one factor in determining how "substantial" the impairment is. Many communicable diseases have a short infectious period and the individual is ill only for a short period of time. Such diseases would be accommodated within a reasonable sick leave policy and would presumably not be the subject of a Section 504 employment action. *See* Brief of AMA at 15, n. 9. Diseases with a prolonged or chronic carrier stage or diseases exciting a great deal of apprehension are more likely to be the subject of discriminatory decisions and hence Section 504 cases. *See*, Burris, Fear Itself: AIDS, Herpes and Public Health Decisions, 3 Yale L. & Pol'y Rev. 479 (1985) (hereinafter cited as "Fear Itself.")

must be determined on a case-by-case basis and on medical criteria.[7] The contention that a person with a communicable disease is in some way unqualified to bring a cause of action under Section 504 finds no support in the case law, regulations, or legislative history of the Act. A person with a communicable disease who is substantially limited in a major life activity due to the effects of such a disease is clearly covered by the Act. 29 U.S.C. § 706(7)(B)(i).

Petitioner is somewhat equivocal on this point and at times appears to argue that communicable diseases are *per se* not handicaps. The Solicitor General appears to concede some inclusion, stating that discrimination against a person debilitated by a communicable disease on the basis of such impairment is unlawful. Brief of United States at 19-21. However, both the Solicitor and Petitioner would carve out an exception for discrimination based on a belief that the plaintiff's disease is contagious. In a recent opinion, the Office of Legal Counsel of the Justice Department has argued that even an irrational fear of "contagion" is a lawful basis for discrimination against persons with communicable diseases.[8]

This purported exception ignores the plain language of the definition of "handicapped individual." A person who is in fact able to transmit a serious disease to others

7. Where the discrimination takes place because the decisionmaker perceives the person to be handicapped, proof may consist of subjective evidence that the decisionmaker believed the person to be substantially limited. *See* Brief of AMA at 13, n. 5.

8. U.S. Justice Department, Office of Legal Counsel, Memorandum for Ronald E. Robertson, General Counsel, Department of Health and Human Services, Re: Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus, hereinafter cited as Justice Department AIDS Opinion. A copy has been lodged with the Court by Petitioner.

in some manner is "substantially limited" through the inability to circulate freely among other people. Moreover, a person who "is regarded as having" an impairment which is substantially limiting fits within the statutory definition whether or not he or she is in fact impaired. 29 U.S.C. § 706(7)(B)(iii).[9] Such persons are, or are perceived as being, unable to associate with others at work, and thus limited in a major life activity specified in the regulations. 45 C.F.R. § 84.3(j)(2)(ii) (1985).[10] Although the inability to socialize or to be around other people is not listed in the definitional regulation, the listed activities are intended to be "representative rather than exhaustive," *Oesterling v.*

9. Congress clearly intended to cover persons who were incorrectly perceived as handicapped or whose impairments were incorrectly perceived as substantially limiting their activities. S. Rep. No. 1297 states at 6389-6390:

> Clause (C) in the new definition [29 U.S.C. § 706(7)(B)(iii)] clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, . . . This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within Clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

Both cases are reflected in the regulations defining "is regarded as having a handicap." 45 C.F.R. § 84.3(j)(2)(iv)(A) covers those who are incorrectly regarded as having a substantially limiting impairment when they are not so limited. Section 84.2(j)(2)(iv)(B) covers those limited only because of attitudes toward their impairment and § 84.3(j)(2)(iv)(C) covers those incorrectly regarded as having an impairment. Thus a person who is an asymptomatic carrier whose major life activities are in fact not limited would be covered if regarded as being casually contagious. *See also* Brief of AMA at 13, n. 5 and 24, n. 20.

10. " 'Major life activities' means functions *such as* caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (1985), emphasis added.

Walters, 760 F.2d at 861, and courts have based a finding that an individual is handicapped on the inability to perform other activities such as to function under stress. *Doe v. New York University,* 666 F.2d at 775.

As the brief of the American Medical Association points out, modern techniques of medicine enable most individuals with tuberculosis to be rendered "noncontagious" within a relatively short amount of time if properly treated. Brief of AMA at 7. This is true of many other communicable diseases as well. *See generally,* A. Benensen, *Control of Communicable Diseases in Man.*[11] In addition, many communicable diseases are transmissible only through specific and limited means, particularly certain bloodborne viral diseases which involve a chronic carrier stage, such as AIDS and hepatitis B. *See id.* at 2-5, 171-181; Sande, Transmission of AIDS, The Case Against Casual Contagion, 314 N. Eng. J. Med. 380 (1986).

Whether as a matter of medical fact a given person with a communicable disease is actually capable of transmitting the disease, and whether his or her participation in the program or position involved is medically inappropriate, cannot be determined by blanket rules. An evaluation of the individual's medical status is required. In light of these factors and of the degree to which misconceptions about the "contagiousness" of various communicable diseases abound among laypersons, it is particularly inappropriate to telescope the entire inquiry regarding Section 504 in communicable disease cases into the definition of handicap as it applies to communicable diseases. Rather, the relevant inquiry is whether the person handicapped by a communicable disease is "otherwise qualified," that is,

11. Among diseases which regularly occur in the United States, the major exceptions at this time are acquired immunodeficiency syndrome (AIDS) and certain forms of hepatitis.

whether the person's medical condition disqualifies him or her for the program or position in question.

A judicial construction of "handicap" which excludes communicable diseases, or excludes discrimination based on "contagiousness," precludes persons with diseases of limited transmissibility (or persons incorrectly regarded as having such diseases) from showing that in the preponderance of medical opinion they present no significant risk. *Cf., Pushkin v. Regents of University of Colorado,* 658 F.2d at 1390. As the Justice Department Opinion on AIDS so forcefully and unfortunately demonstrates, such exclusion will permit, and perhaps even encourage, wholly arbitrary and irrational discrimination against such persons.

It was precisely this kind of arbitrary discrimination, based on ignorance, fear and mistaken assumptions about the limitations attendant on particular physical conditions, which the Rehabilitation Act was intended to combat. *See, e.g.,* S. Rep. No. 1297 at 6400; *Pushkin v. Regents of the University of Colorado,* 658 F.2d at 1385 ("Discrimination on the basis of handicap usually results from more invidious causative elements [than actual hostility] and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons"); *Southeastern Community College v. Davis,* 442 U.S. at 405, 412.

Protection against arbitrary discrimination is particularly important where communicable diseases are concerned. Some of these diseases have engendered a great deal of fear in the public at large, leading to decisions which lack a demonstrable medical or public health basis. *See* Fear Itself, 3 Yale L. & Pol'y Rev. 479 and case studies discussed therein; *see also New York State Ass'n for Retarded Children v. Carey,* 612 F.2d 644 (exclusion

of retarded children with hepatitis not supported by medical evidence). Since such diseases are physiological conditions, it is entirely appropriate to consider them as handicaps and thus protected under Section 504.

In sum, any person who is fired or otherwise excluded based on a program administrator's belief that he or she is "contagious" is *ipso facto* "regarded as having" an impairment (an infectious disease) which "substantially limits" a major life activity (the ability to be in contact with others), and must therefore be considered as handicapped within the meaning of 29 U.S.C. § 706(7)(B)(iii). The real question in a case involving a communicable disease is whether the exclusion is legitimate, that is, based on a sound and reasonable medical basis. However, that inquiry is better undertaken as part of the determination whether the person is "qualified" and not the determination whether he or she is "handicapped."

2. There is No Reason to Interpret Section 504 As Excluding Communicable Diseases.

Petitioner and the Solicitor General raise several arguments in opposing the inclusion of communicable diseases and real or perceived "contagiousness" as handicapping conditions. None of these can survive close scrutiny.

First, it is argued that the legislative history of the Act does not support such an inclusion. In fact, as the Court of Appeals noted, the legislative history does not speak directly to this point. *Arline v. School Board of Nassau County,* 772 F.2d at 764. This silence tips in favor of inclusion, not exclusion, however. In interpreting civil rights statutes having a broad, remedial purpose, courts are reluctant to adopt a limiting construction absent some legislative direction. *Grove City College v. Bell,* 465 U.S.

555, 564 (1984); *Alexander v. Choate,* 105 S.Ct 712 (1985). "Where the words and purpose of a statute plainly apply to a particular situation, . . . the fact that the specific application of the statute never occurred to Congress does not bar us from holding that the situation falls within the statute's coverage." *United States v. Jones,* 607 F.2d 269, 273 (9th Cir. 1979), *cert. denied,* 444 U.S. 1085 (1980). *See also Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories,* 460 U.S. 150 (1983).

Communicable diseases fall within the language of the statute and implementing regulations, as was stated above. They are "physiological disorders" which may substantially limit major life activities in many ways. If persons with a communicable disease are, or are regarded as being, capable of transmitting the disease through casual contact, they are, or are regarded as being, substantially limited in their contacts with others, clearly a major life activity.

Since communicability stems from the presence of a physiological disorder, the inclusion of communicable diseases as handicaps does not open the door to inclusion of other characteristics which may be the subject of unfavorable attitudes but are not physiologically or mentally based, or to inclusion of physical characteristics which are not "disorders" or "impairments," like lefthandedness, *de la Torres v. Bolger,* 781 F.2d at 1138, or high body density or curly hair, *Tudyman v. United Airlines,* 608 F.Supp. 739, 745-746. *See also Jasany v. United States Postal Service,* 755 F.2d at 1245-1250; *E.E. Black, Ltd. v. Marshall,* 497 F.Supp. 1088 (D. Haw. 1980). Communicability, moreover, is an intrinsic part of communicable diseases. Indeed, it is their distinguishing characteristic. There is no basis for separating out one such characteristic of a handicapping condition and excluding it from coverage. Inclusion of all characteristics or effects of communicable diseases, including communicability, is logical and will not stretch the meaning of the Act beyond its obvious limits. *Cf. Alexander v. Choate,* 105 S.Ct. at 720.[12]

Petitioner further argues that inclusion of communicable diseases would produce absurd results, such as the exposure of school children to persons with active tuberculosis. This argument ignores the further requirement that

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12. Physical characteristics which are not "impairments" or "disorders" are not covered, but those which are or stem from physical impairments or disorders are covered. The regulations specifically mention "cosmetic disfigurement." 45 C.F.R. § 84.3(j)(2)(ii). The Solicitor General thus sweeps too broadly in contending that physical appearance does not constitute a handicap. Like contagiousness, it can be an effect of a handicapping condition. If an employer or program administrator says that the discrimination is based on the handicapped person's appearance (e.g., a withered arm) and not on the fact of the handicap, that conduct is still covered under the Act. Appearance that results from a handicapping condition cannot be separated out as an uncovered characteristic any more than "contagiousness."

Indeed, the ambiguous reference to "appearance" at page 20 of the Solicitor General's brief illustrates the absurdity and circularity of singling out a particular characteristic of an impairment and contending that it is not a covered basis of discrimination because Congress intended only to cover "handicaps." Surely an employer or other program administrator could not refuse to hire a person disabled by polio simply on the ground that he or she found the person's appearance distasteful notwithstanding that the person was fully qualified for the position or program. *But see* Brief of United States at 23, n. 21. Congress clearly intended to cover such discrimination, as the legislative history of the Act cited herein amply demonstrates. Congress never intended to proscribe discrimination only if it was based on a belief that the handicapped person was functionally impaired. Antipathy or hostility is not a requirement for a claim under Section 504, but neither is it a defense. *See Pushkin v. Regents of the University of Colorado,* 658 F.2d at 1389-1390.

a person who establishes that he or she is handicapped must in addition be found qualified for the position or program in question. If it can be established under the procedure discussed in part II below that an individual in fact is capable of transmitting a serious disease in the workplace, the individual would not be qualified for certain kinds of employment.[13] However, to protect persons who have or are perceived as having diseases which are communicable only in a limited sense from arbitrary or irrational discrimination, and thus to fulfill Congress' intent that persons not be arbitrarily excluded on the basis of physical impairments, it is necessary to consider such persons as "handicapped individuals."

II. WHETHER A PERSON AFFLICTED WITH A COMMUNICABLE DISEASE SHOULD BE EXCLUDED FROM A PARTICULAR POSITION MUST BE DECIDED CASE-BY-CASE BASED ON REASONABLE JUDGMENTS IN LIGHT OF THE MEDICAL EVIDENCE.

Once a person is deemed handicapped, the key inquiry is whether he or she is "otherwise qualified" for the program or position sought. Generally an otherwise qualified person is one who is able to meet all of a program's requirements with some accommodation but without a fundamental alteration of the program's requirements. *Southeastern Community College v. Davis,* 442 U.S. at 406, 413; 45 C.F.R. § 84.12 (1985). Amici States generally concur with the brief of the American Medical Association that whether a person is "otherwise qualified" requires an individualized, case-by-case approach not a blanket rule with

13. However, contagiousness may not be related to whether one is "otherwise qualified" for certain programs such as hospital or nursing home care or welfare benefits which are also covered under the Act, and may be important in cases involving communicable diseases.

respect to all diseases including tuberculosis. Brief of AMA at 18-20. The record in the present case is too sparse to ascertain whether the trial court applied the proper analytical framework. This Court should, therefore, remand and offer guidance to the trial court to assist it on remand in properly applying Section 504. *Cf. McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 798 (1973).

In a Section 504 case involving a communicable disease there must be an individualized inquiry by the trial court to determine whether the individual is "otherwise qualified" given the degree to which his or her condition poses a risk of harm to others in that particular context.

This is precisely the way courts have approached other Section 504 cases involving a risk of harm. *See, e.g., Doe v. New York University,* 666 F.2d at 777-779; *Doe v. Region 13 Mental Health-Mental Retardation Commission,* 704 F.2d at 1412; *Pushkin v. Regents of University of Colorado,* 658 F.2d at 1386-1387; *New York State Ass'n for Retarded Children v. Carey,* 612 F.2d at 649-650; *Strathie v. Department of Transportation,* 716 F.2d 227, 231-232 (3rd Cir. 1983); *Mantolete v. Bolger,* 767 F.2d 1416, 1422-1424 (9th Cir. 1985). In such cases courts first ascertain the medical facts regarding the individual's condition and the degree of risk it poses, then evaluate the reasonableness of the agency's or employer's decision, giving the plaintiff the opportunty to rebut the evidence offered by the decisionmaker. *E.g., Pushkin,* 658 F.2d at 1387; *Doe v. New York University,* 666 F.2d at 777.

Where the decision was based on unfounded assumptions about plaintiff's condition or the risks involved, the plaintiff has prevailed. *E.g., Pushkin; New York Ass'n for Retarded Children; Strathie; Grube v. Bethlehem Area School District,* 550 F.Supp. 418 (E.D. Pa. 1982); *Poole v.*

South Plainfield Board of Education, 490 F.Supp. 948 (D.N.J. 1980). Where the court considers the decision a reasonable one in light of the risks posed by plaintiff, the decision to exclude has been upheld. *E.g., Doe v. NYU; Doe v. Region 13.* Section 504 cases involving communicable diseases fit comfortably into this framework. In the case of communicable diseases, there will be situations when the plaintiff's condition is such that it is reasonable to preclude employment in the position sought. In other situations, however, the risk of harm may be so attenuated that it is unreasonable to exclude the individual from employment.[14] In cases involving health care facilities a patient may be "qualified" despite a highly contagious condition. But as in Section 504 cases generally, the assessment of the risk must be based on medical evidence and not on preconceptions, mistaken assumptions or stereotypes. *Pushkin v. Regents of University of Colorado,* 658 F.2d at 1385. "[A] good faith or rational belief on behalf of the employer will not be a sufficient defense." *Mantolete v. Bolger,* 767 F.2d at 1423. *See also Pushkin,* 658 F.2d at 1383, 1390.

Moreover, the reasonableness of the decision to exclude must be evaluated by the court not simply on evidence the decisionmaker actually had at the time of the decision. The decisionmaker has an obligation under the Act to gather sufficient information both from the handicapped

14. Although the cases are not uniform, a substantial risk is ordinarily required before a handicapped person may be excluded. *See, e.g., Doe v. New York University,* 666 F.2d at 777 ("a significant risk of harm," though less than fifty percent); *New York Ass'n for Retarded Children v. Carey,* 612 F.2d at 650 ("some substantial showing" of a health hazard); *Strathie v. Department of Transportation,* 716 F.2d at 232 (some "appreciable risk"). No case requires a plaintiff to demonstrate to a near certainty that he or she does not pose any risk to others, even though the risks posed could be quite serious. The Justice Department AIDS opinion at 38-39 would impose such a burden in cases involving AIDS.

individual and from qualified experts and such resources as published guidelines of the United States Public Health Service to determine whether employment or inclusion in the program would be possible without a reasonable probability of a significant risk of harm. *See Mantolete v. Bolger,* 767 F.2d at 1423.

In addition, a plaintiff should not be precluded from rebutting the evidence offered by the decisionmaker and attempting to show that the decision was based on incorrect information or assumptions, so long as the evidence reflects the state of medical knowledge and plaintiff's condition at the time the decision was made. As the 1974 Senate Report stated, discrimination against the disabled is often the result of "archaic attitudes and laws" and lack of understanding by the public "about the potential of these individuals to contribute significantly to society." S. Rep. No. 1297 at 6400. To preclude a plaintiff altogether from rebutting an employer's contentions "would be to preclude individual plaintiffs from ever rebutting the reasons articulated by a defendant for the actions which it has taken. Indeed it would preclude relief under § 504." *Pushkin,* 658 F.2d at 1390. *See also New York Ass'n for Retarded Children v. Carey,* 612 F.2d at 649-650.

As the Court of Appeals pointed out in *New York Ass'n for Retarded Children,* 612 F.2d at 649, n. 5, Section 504 is part of the general corpus of discrimination law. It was enacted within months of this Court's decision in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792. Congress was undoubtedly aware of this Court's determinations regarding burdens of proof in that case. As in Title VII, in Section 504 Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on

the basis of [an] impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). To effectuate this purpose, it is necessary to allow the plaintiff an opportunity to show that the decisionmaker's proffered reasons do not have a valid basis in fact. *E.g., Strathie v. Department of Transportation; Pushkin.* In the context of determining whether a handicapped person is "otherwise qualified" actual hostility or invidious intent need not be shown since often discrimination against the handicapped is based on ignorance or mistaken assumptions about their capabilities. *See Alexander v. Choate,* 105 S.Ct. at 718; S. Rep. No. 1297.

In short, as in other Section 504 cases and other discrimination cases, a full and fair opportunity must be given to the person handicapped or perceived to be handicapped by a communicable disease to establish that he or she is in fact qualified for the position or program and poses no significant risks.

III. SECTION 504, AS APPLIED TO CASES INVOLVING COMMUNICABLE DISEASE, CAN BE HARMONIZED WITH PUBLIC HEALTH LAW.

Both Petitioner and the Solicitor General argue that inclusion of communicable diseases within the ambit of Section 504 would infringe on the delicate state-federal balance and upset existing public health statutes. On the contrary, the two schemes can be harmonized.

The control of communicable diseases is a matter of both state and federal concern. Early, and largely ineffectual, efforts to prevent the spread of communicable disease though such methods as quarantine were enacted in response to severe epidemics, at a time when the etiology of epidemic diseases was not at all understood by the majority of the medical profession, let alone by lay persons. *See* C. Winslow, *The Conquest of Epidemic Diseases*

193-235.[15] Once the medical and public health professions had succeeded in identifying particular communicable diseases and their modes of transmission, strategies could be designed to eliminate particular modes of transmission such as insect carriers or contaminated water or food products, or particular disease organisms through antibiotic drugs, or to improve general immunity through vaccination programs. *Id.*, at 362-380; Morgenstern, The Role of the Federal Government in Protecting Citizens From Communicable Diseases, 47 U. Cinn. L. Rev. 537, 541-546 (1978) (hereinafter cited as "Communicable Diseases"). Today, the federal effort largely consists of the gathering of statistics and providing funds for research and for assistance to States in developing comprehensive health planning and immunization programs. *E.g.*, 42 U.S.C. § 247b. *See* Morgenstern, 47 U. Cinn. L. Rev. at 543-545. In addition, designated federal officials have the power to apprehend or detain persons with a communicable disease in a communicable stage to prevent the spread of certain diseases designated by the President, including preventing such persons or contaminated goods from entering the United States. 42 U.S.C. § 264b.

States commonly have undertaken compulsory immunization programs, particularly for school children.[16] Re-

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15. The early federal laws concerning quarantine were enacted following a serious epidemic of yellow fever in Philadelphia, then the nation's capitol, in 1793. *See* Morgenstern, The Role of the Federal Government in Protecting Citizens from Communicable Diseases, 47 U. Cinn. L. Rev. 537, 541 (1978); C. Winslow, *The Conquest of Epidemic Disease* 193-235. The disease was brought under control by controlling the carrier mosquitoes, C. Winslow, at 353-357, and by development of a vaccine. A. Benensen, *Control of Communicable Diseases in Man* 438.

16. *E.g.*, Cal. Health & Saf. Code, §§ 3380-3390; N.Y. Pub. Health Law, § 680 (McKinney 1985). *See* Morgenstern, Communicable Diseases, 47 U. Cinn. L. Rev. at 544, n. 62.

porting of communicable diseases is also common.[17] Most States also entrust public health officials with broad, general powers to quarantine and isolate individuals where necessary to protect or preserve the public health. *E.g.*, Cal. Health & Saf. Code, §§ 3051, 3123 (West 1979); N.Y. Pub. Health Law § 2100; Title 10, New York Admin. Code § 2.5 *et seq.*, § 2.25 *et seq.* Similarly, isolation may sometimes be compelled in cases where a person with a communicable disease in a transmissible state refuses to follow the prescribed course of treatment. *E.g.*, Cal. Health & Saf. Code, §§ 3193, 3351 (West 1979); Cal.Admin. Code, Title 17, §§ 2624, 2636(m) (1983).

The Solicitor General suggests that including actions based on contagiousness within the ambit of Section 504 will make such control efforts subject to suit and thus inhibit the ability of States and the federal government to protect the population from communicable disease. On the contrary, in at least 16 States and the District of Columbia some or all communicable diseases are already covered under state handicap discrimination laws. Obviously these States perceive no such conflict.[18] No such conflict exists

17. Cal. Health and Saf. Code, § 3123 (West 1979); N.Y. Pub. Health Law §§ 2101-2105 (McKinney 1985); Title 10, New York Admin. Code §§ 2.10-2.18. New York defines AIDS as a communicable disease only for reporting purposes. Title 10, New York Admin. Code 24-1.1 *et seq.*

18. The States are: Colorado, 1 AIDS Pol'y & L. (BNA) No. 13, p. 4 (July 16, 1986); Delaware, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); Florida, 1 AIDS Pol'y & L. No. 11, p. 3 (June 18, 1986); Maine, 2 Empl. Prac. Guide (CCH) ¶ 5023; Massachusetts, 2 Empl. Prac. Guide (CCH) ¶ 5025; Minnesota, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); Missouri, 1 AIDS Pol'y & L. (BNA), No. 11, p. 3 (June 18, 1986); New Hampshire, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); New Jersey, 2 Empl. Prac. Guide (CCH) ¶ 5026; New Mexico, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); *New York, People v. 49 West 12 Tenants Corp.*, No. 43604/83

(Continued on following page)

where immunization programs are concerned, since they apply across the board, for example to all children entering school, and therefore do not single out persons who have communicable diseases.[19] Similarly, reporting statutes, unless they also require exclusion from some federally assisted program, would not be covered by Section 504.

With respect to other actions which do single out persons with communicable diseases, public health agencies are already subject to suit in federal court on constitutional grounds for actions which invade individual privacy or restrain personal liberty. *E.g.*, *Camara v. Municipal Court,*

(Continued from previous page)

(Sup. Ct., NY Co., Oct. 17, 1983); N.Y. Exec. Law §§ 296, 292.21 (McKinney 1985); the State Division of Human Rights has determined that the New York Human Rights Law protects against discrimination because a person has AIDS or is regarded as having AIDS. DHR Release No. 86067727 (1986); Oregon, 2 Empl. Prac. Guide (CCH) ¶ 5020; Rhode Island, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); Texas, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); Wisconsin, 1 AIDS Pol'y & L. (BNA), No. 13, p. 4 (July 16, 1986); Washington, 1 AIDS Pol'y & L. (BNA), No. 11, p. 3 (June 18, 1986); Opinion Letter of John H. Suda, Acting Corporation Counsel, District of Columbia (Oct. 15, 1985). California's Fair Employment statute, Cal. Government Code § 12940, was broadly construed in *American National Ins. Co. v. Fair Employment and Housing Comm.*, 32 Cal.3d 603, 651 P.2d 1151, 186 Cal. Rptr. 345 (1982), as precluding any arbitrary discrimination against a physical condition that is actually or potentially handicapping, including illnesses. In California the Department of Fair Employment and Housing accepts complaints of discrimination against people with AIDS and has contended that AIDS is covered as a handicap under state law. *Department of Fair Employment and Housing v. Raytheon Co.*, FEHC Case No. FEP 83-84, L1-0310p. The issue is now pending before the Fair Employment and Housing Commission.

19. Under a Section 504 analysis it would be permissible to exclude temporarily from school a child who refuses immunization and who has the disease in question in an infectious stage until the end of the infectious period. Such a child is not "otherwise qualified" for school attendance while actually infectious. See part II above. The infectious stage of diseases for which immunization is required is typically short.

387 U.S. 523 (1967); *See v. City of Seattle,* 387 U.S. 541 (1967) (housing code and fire code inspections challenged on Fourth Amendment grounds); *Jew Ho v. Williamson,* 103 F. 10 (1900) and *Wong Wai v. Williamson,* 103 F. 1 (1900) (quarantine of 12 city blocks and inoculation order directed at Chinese challenged on Equal Protection and Due Process grounds). Therefore restrictive measures such as quarantine and isolation orders directed at groups of people or individuals are already subject to challenge.[20]

Generally speaking, such actions have been upheld where public health officials can demonstrate a public health necessity, that is, the existence of a public health problem and at least a rational and demonstrable relationship, based on medical evidence, between the means chosen and the problem. Where individual liberty is restrained, the least restrictive alternative must also be chosen. *See, generally,* Fear Itself, 3 Yale L. & Pol'y Rev. at 481, 488-495; Mills, Mills and Wofsy, The Acquired Immunodeficiency Syndrome, Infection Control and Public Health Law, 314 N. Eng. J. Med. 931, 934 (1986).

Adding a cause of action under Section 504 to possible constitutional challenges to public health measures

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20. In any event, quarantine is used quite sparingly today.

> Quarantine as a strategy for infection control has generally been used only in individual cases for narrow purposes: to enforce the treatment of a noncompliant patient infected with tuberculosis, to segregate a patient with an untreatable but self-limited disease such as smallpox, or to control the spread of a severe and highly communicable disease such as plague. Quarantine has been used only rarely for patients with sexually transmitted diseases. Long-term quarantine of large populations in isolated communities has been invoked in the 20th century only for leprosy, and that use is now widely thought to have been unjustified.

Mills, Mills & Wofsy, Acquired Immunodeficiency Syndrome, Infection Control and Public Health Law, 314 N. Eng. J. Med. 931, 934 (1986).

would add little, if anything, where extremely restrictive actions like quarantine or isolation are concerned, since the highest constitutional standards would already obtain. It would not preclude isolation or confinement where the medical facts justify such action.

Section 504's greatest impact would be on decisions or regulations restricting carriers of certain diseases from school or certain kinds of employment, for example the exclusion of retarded children who were carriers of hepatitis B which was challenged in *New York Ass'n for Retarded Children v. Carey,* 612 F.2d 644, or the decision in the instant case. As in the employment context generally, allowing a cause of action to be maintained does not mean that exclusions which are based on demonstrable and supportable medical concerns will not ultimately be upheld. It simply subjects such decision to scrutiny and allows those which are not or cannot be supported to be set aside. If Section 504 were invoked to preclude actions by public health officials which were based on irrational, uninformed or medically unsupportable distinctions, the public interest would be furthered not hindered.

Moreover, subjecting state police power actions to federal non-discrimination requirements has direct paralells both in Section 504 cases and in discrimination law generally. The State's power to protect the public from communicable diseases is qualitatively no different than its power to protect school children from unsafe transportation. Yet Section 504 applies in that context. *Strathie v. Department of Transportation,* 716 F.2d 227. *See also Kampmeyer v. Nyquist,* 553 F.2d 296 (2d Cir. 1977); *Grube v. Bethlehem Area School Dist.,* 550 F.Supp. 418; *Poole v. South Plainfield Board of Education,* 490 F. Supp. 948 (handicapped students in high school athletics).

Federal non-discrimination law generally applies to innumerable areas primarily left to the States such as

education, and even the hiring of state employees. *Dothard v. Rawlinson,* 433 U.S. 321 (1977). *See* 42 U.S.C. 2000e(a). Courts are quite familiar with such problems and are able to administer and harmonize overlapping regulatory systems, particularly in the area of civil rights. Unlike the situation in *Bowen v. American Hospital Ass'n,* 106 S.Ct at 2120, the inclusion of communicable diseases within the ambit of Section 504 does not reorder the priorities of state regulatory agencies nor enlist them as "foot soldiers in a federal crusade." *Bowen,* 106 S.Ct. at 2120. Indeed, it would not alter the balance between state and federal authority.

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CONCLUSION

Legislative history, case law and administrative regulations interpreting Section 504 require the inclusion of communicable diseases as covered handicaps under Section 504. This construction is necessary to foreclose arbitrary discrimination against persons with such diseases. The determination whether a person with a communicable disease in fact poses a risk to others, and may therefore lawfully be excluded, should be made in determining whether such person is qualified for the program or position in question, and not in determining whether the person should be covered by Section 504 at all.

DATED: September 16, 1986

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No. 85-1277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, et al.,

Petitioners,

—v.—

GENE H. ARLINE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR PERMISSION TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR THE AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION, AMERICAN NURSES ASSOCIATION, AND NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AS *AMICI CURIAE*

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No. 85-1277

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1985

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, et al.

Petitioners

v.

GENE H. ARLINE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals for the Eleventh Circuit

MOTION FOR PERMISSION TO FILE BRIEF AMICI CURIAE

The American Public Health Association, the American Civil Liberties Union, the American Nurses Association and the National Association of Protection and Advocacy Systems respectfully move this Court for permission to file the accompanying brief

amici curiae in support of Respondent. Consent was granted by both parties to the filing of a brief by the ACLU. In a subsequent request to add other parties, Respondent consented but no response was received from Petitioner. Leave of this Court therefore is requested under Rule 36 of this Court.

The interests of the amici are set forth below. The accompanying brief addresses issues of fact and law concerning both the public health and the civil rights ramifications of this case. Amici have reason to believe that their brief will supplement rather than reiterate the arguments made by Respondent.

INTERESTS OF AMICI CURIAE

American Public Health Association

The American Public Health Association ("APHA"), founded in 1872, is the oldest and largest professional public health society in the world, with a combined national and affiliate membership of over 50,000 health professionals. The largest single component of APHA members are officials and employees of federal, state and local public health agencies. APHA members include physicians, dentists, nurses, social workers, health planners, administrators, and other health professionals.

APHA strives to advance and protect the health of the American people by promoting preventative measures, including restricting the spread of communicable diseases, increasing the availability of health services, encouraging a safe and healthful

environment, launching public health education programs, and publishing numerous materials reflecting developments in public health. APHA publishes the definitive compendium "Control of Communicable Diseases in Man" (14th Ed. 1985, A.S. Benenson, Ed.).

American Civil Liberties Union

The American Civil Liberties Union (ACLU) is a nation-wide, non-partisan organization of more than 200,000 members dedicated to defending the principles embodied in the Bill of Rights. Since its founding in 1920, it has participated in thousands of cases involving questions of constitutional and statutory law.

American Nurses Association, Inc.

The American Nurses Association is the national oranization of professional nurses. It is a federation of fifty-three

constituent state and territorial nurses associations. Through its federation members, ANA has a membership of 188,000 registered nurses.

One unique purpose of ANA is to shape public policy about health care consonant with the goals of nursing and public health. The association is committed to the protection of both the public health and the individual rights of patients and nurses within the health care system.

Nurses are the largest single group of health care providers. They provide health care for patients with communicable diseases and other life-threatening ailments. Accordingly, many nurses have been exposed to and have contracted such infectious diseases as tuberculosis, hepatitis and measles. Nurses and the ANA thus have a vital interest in an approach to Section 504 which appropriately protects the public and

individuals in accordance with established guidelines of the Centers for Disease Control and professional organizations.

National Association of Protection and Advocacy Systems

The National Association of Protection and Advocacy Systems represents Governor-designated Protection and Advocacy Systems established pursuant to Section 113 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6042, and Governor-designated Client Assistant Projects established pursuant to Section 112 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §732. These agencies have the statutory mandate to protect and advocate the rights of developmentally disabled persons and other handicapped persons. Both types of agencies protect the rights of persons under

Section 504 of the Rehabilitation Act, including persons with common, communicable diseases.

Respectfully submitted,

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September, 1986

No. 85-1277

IN THE SUPREME COURT
OF THE
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OCTOBER TERM, 1986

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA,
et al.
Petitioners
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GENE H. ARLINE,
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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF
THE AMERICAN PUBLIC HEALTH ASSOCIATION,
AMERICAN CIVIL LIBERTIES UNION,
AMERICAN NURSES ASSOCIATION,
AND
NATIONAL ASSOCIATION OF PROTECTION AND
ADVOCACY SYSTEMS
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

SUMMARY OF ARGUMENT

In Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, Congress prohibited employment discrimination by federally funded agencies against handicapped persons who were otherwise qualified to do the job in question. When a court is

confronted by a case, such as this one, in which the employer alleges that a firing is justified because plaintiff's handicapping condition is or has been or is thought to be communicable, the proper inquiry is whether a significant risk exists of endangerment to others by transmission of the disease. To be accurate and meaningful, this inquiry must be tailored to each individual, his or her specific condition, and the particular work situation. The structure of the analysis is no different than when courts analyze whether some other aspect of a handicap - such as a lesser ability to see or hear or operate equipment - poses a risk of danger to other persons. Reliance on this standard protects both public health and the rights of millions of Americans who otherwise could be barred from federal jobs and programs.

The medical facts about the condition at issue in this case, tuberculosis, show that

its actively infectious period is short. Widely available medical tests can easily and accurately indicate when that period is over. Medical authorities are unanimous that once the risk of transmission has ended, the tuberculosis patient can and should return to work.

Thus there is no public health need for the trial court's ruling excluding communicable diseases per se from the scope of Section 504, a ruling which has no basis in statutory language, legislative history or case law. Nor is the position advanced by Petitioner and the Department of Justice tenable, that firing Ms. Arline based on fear of contagion was not a firing based on a handicap. Communicability is an inherent (although often dormant) characteristic of tuberculosis and many other diseases. It comprises an inseparable part of the impairment, real or perceived, which flows

from having the handicap, and cannot be equated to coincidental characteristics such as height or weight. The Justice Department's theory that nothing more than a fear of contagion, however irrational, can preclude action under Section 504 is a flagrant misreading of the Act and a violation of its core purpose -- to prohibit medically unjustified discrimination against handicapped persons.

Promotion of public health concerns is aided, not impeded, by an individualized determination of whether persons with communicable conditions are qualified to work. Protecting affected workers from loss of employment encourages immediate reporting of symptoms and quick treatment, the most effective method of preventing transmission of tuberculosis. Section 504, properly interpreted, poses no threat to public health systems based on reporting cases of disease

and isolating patients when medically necessary.

ARGUMENT

1. TUBERCULOSIS IS A DISEASE WHOSE INFECTIOUSNESS ENDS PROMPTLY WITH TREATMENT AND FOR WHICH A TEST EXISTS TO DETERMINE NON-INFECTIOUSNESS TO A MEDICAL CERTAINTY.

In the United States an estimated 15 million people have been infected by the germ which causes tuberculosis.[1/]

All of these people have the potential for having the infection progress to disease and

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1/ Tuberculosis (United States Public Health Service, Centers for Disease Control, undated) at 2. The Health Examination Survey of the National Center for Health Statisics found the prevelence of infected adults (positive skin tests) was between 16.1% and 21.5% of persons aged 25-74. Nat'l Center for Health Statistics, Tuberculin Skin Test Reaction Among Adults 25-74 Years, DHEW Publication No. (HRA) 77-1649 at 5-6 (1977). Applying these percentages, the numbers of infected American adults range from 38,640,00 to 51,600,000.

thereby become communicable, but the actual occurrence of the disease and its transmission is low. Leff & Geppert, Public Health and Preventive Aspects of Pulmonary Tuberculosis, 139 Arch Intern Med 1405 (Dec. 1979). In 1978, there were 28,521 reported cases of tuberculosis; unpublished data of the Centers for Disease Control (CDC) of the United States Public Health Service show a decline to 22,201 reported cases in 1985.

CDC offers the following summary of tuberculosis:

> A person with tuberculosis coughs or sneezes into the air thousands of tiny, moist droplets which may contain one or two tubercle bacilli. These droplets dry out and become small flecks, called "droplet nuclei," which are light enough to remain floating in the air.
>
> The typical setting for infection is a closed room with poor ventilation. If the germs float out into the sunlight, they are quickly killed. In a closed room, another person can breathe in these tiny droplet nuclei. But the body has many natural traps which catch such foreign elements. To infect a person, a droplet nucleus must ride the air deep into the lungs without being stopped.

There it becomes imbedded and the germ begins to multiply very slowly.

> Germs such as those causing tonsillitis multiply in a matter of minutes. The TB germ takes about 18 to 24 hours to reproduce itself just once. But a tonsillitis infection lasts only a few days, whereas tuberculosis infection can last for the remainder of a person's life.
>
> Though tubercle bacilli begin to muliply and spread, the body sets up a defense. Usually the defense is sufficient to stop the growth of the germs and further progression of the disease is halted for the rest of the person's life. This is possible because the germ will hibernate without ever causing disease, and the damage done seldom has any effect on the person's physical well-being.
>
> Sometimes, though, disease develops soon after a person becomes infected. This does not occur often, so the greatest danger is the long-term threat of tuberculosis infection. Infection from years earlier may progress to disease during periods of stress caused by other illnesses or physical or emotional hardship, but often for no apparent reason. When the disease develops, the infection can be spread to others.

Tuberculosis, supra, n. 1 at 2-3.

Symptoms of tuberculosis which usually appear first are loss of weight and strength,

fatigue, irregular appetite and low-grade fever. As the disease progresses and becomes communicable, cough, thick mucus brought up from the lungs or blood-streaked sputum may develop, and chest pains and breathing difficulties may occur. Id. Untreated, the disease may become debilitating, but with treatment, over ninety percent of patients are relieved from symptoms and become non-communicable within days or weeks. American Thoracic Society, and Centers for Disease Control, Control of Tuberculosis, 128 Am. Rev. Respiratory Disease, 336, 340 (Aug. 1983); Lester, Treatment of Tuberculosis, in Pulmonary Diseases and Disorders, 1306-07 (1980). Eight-and-one-half percent of persons with the disease are drug resistant to some degree, although varying the components of the chemotherapy often results in cure. Glassroth, Robins & Snyder, Tuberculosis in the 1980s, 302 New Engl. J.

Med. 1441, 1445 (June 26, 1980). Approximately 3000 people died from tuberculosis in the United States in 1977. Id. at 1441.

Tuberculosis is not a highly infectious disease and transmission usually requires fairly close, frequent or prolonged exposure. Leff & Geppert, supra, at 1405-06. The best method to break the chain of transmission is decontamination through proper ventilation, often an open window. Although infants are more susceptible to tuberculosis, among children 5 to 13 years old the incidence of the disease is no greater than the population as a whole. Comstock, Livesay & Woolpert, The Prognosis of a Positive Tuberculin Reaction in Childhood and Adolescence, 99 Am. J.

Epidemiology, 131, 134.[2/]

The public health laws of the United States expressly recognize the distinction between an infection and the communicable stage of a disease. The basic provision is 42 U.S.C. §264 which authorizes the Surgeon General to isolate persons within the United States "reasonably believed to be infected with a communicable disease in a communicable stage." 42 U.S.C. §264(d). (emphasis added) The regulations of the Surgeon General are to like effect. 21 C.F.R. §§1240.40, 1240.50. Similarly, the Immigration and Naturalization Act provides for exclusion of aliens "who are affected with any "dangerous contagious disease." 8 U.S.C. §1182(a)(6). The Public Health

2/ The only physician whose testimony is in the record appeared to believe that elementary school children are more susceptible to tuberculosis than older children and adults, a position not supported by the medical research.

Service regulations applicable to the immigration laws define "dangerous, contagious disease" as including "tuberculosis, active." 42 C.F.R. §344.

References to public health measures in briefs supporting Petitioner fail to make the distinction between infection and a disease in a communicable stage. All fifteen million or more "infected" Americans are potential future communicators but cannot communicate tuberculosis until they are actually afflicted with the disease itself, that is, develop active illness. As the CDC states, "[w]hen disease develops, the infection can be spread to others." Tuberculosis, supra n. 1 at 3. The disease and its infectiousness are inseparable; the basic medical facts thus reject the attempt of Petitioner and the Department of Justice to separate them. See infra at 26-35.

The advent of effective drug therapy in

the 1940s and 1950s has dramatically shortened the length of the active tubercular disease and hence its period of communication. A leading text notes:

> The clinical course of tuberculosis has been transformed from that of a lingering disease, often pursuing a downhill course, to that of a curable disease whose symptoms rapidly disappear. With the decline in infectiousness for others, isolation procedures can be eased. So dominant is the chemotherapeutic effect that bed rest can be dispensed with and, in many cases, full activity resumed in a few weeks. For the tuberculosis patient, the change from prolonged isolation in a sanitarium with guarded prognosis to relatively normal life with good prognosis is nothing short of miraculous.

Riley, The Changing Scene in Tuberculosis, in Pulmonary Diseases and Disorders, 1229 (1980).

In fact, TB sanitariums have virtually disappeared. As the CDC concludes, "[p]ersons with TB disease can live and work productively and can be cured by taking their medicine as prescribed." Tuberculosis, supra n.1 at 5.

The other major factor with respect to

control of contagiousness of tuberculosis is the development of two tests which can determine when a patient is no longer infectious -- the sputum smear and the sputum culture.

Microscopic examination of a sputum smear is regularly used to determine infectiousness. Glassroth et al., supra, at 1443. The sputum smear can be examined immediately so that no delay is necessary. Id.; Farer, The Modern Approach to Tuberculosis Management, in J. Respiratory Diseases 92 (Jan. 1980). The American Thoracic Society, the professional medical society for pulmonary disease, and CDC have established criteria for when an otherwise healthy patient with tuberculosis may return to usual activities such as work or school. These criteria provide that a return is appropriate when "adequate treatment has been initiated and the sputum is free of bacilli

or the number of bacilli present in sputum smears is declining." American Thoracic Society and Centers for Disease Control, Guidelines for Work for Patients with Tuberculosis, 108 Am. Rev. Respiratory Disease 160 (July 1973). CDC standards provide that when three consecutive [smear] specimens are negative, the patient may be considered a "non-transmitter." Centers for Disease Control, Guidelines for Prevention of TB Transmission in Hospitals, HHS Publication No. (CDC) 82-8371 at 5 (1982).

The other test which definitively determines non-infectiousness is based on a culture study of specimens of the patient's sputum; a negative culture indicates the absence of active disease and hence the patient is non-communicable. Ninety percent of patients are culture negative within ninety days of treatment. Amer. Thoracic Society, Control of Tuberculosis, supra at

340; Lester, supra, at 1306-07.[3] A culture test may require four to six weeks before results are available so that complete verification of non-communicablity entails a waiting period. However, it has long been recognized "that patients on effective chemotherapy lose their infectiousness for others long before the sputum culture is negative." Riley, supra.

What emerges from an understanding of the contagiousness of tuberculosis is that the true danger lies in the person who has not received treatment, and is not isolated (where necessary) for the short period of time before the disease responds to chemotherapy and is no longer contagious. Studies have demonstrated that once treatment begins, there is no difference in the rate of

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3/ Respondent tested positive on a culture in 1979 and was negative in 1981. J.A. 19-20. The Joint Appendix does not indicate whether there were any tests in between these two or the results.

infection of family members of tuberculosis patients treated at home as compared to those treated in a hospital. Leff & Geppert, supra, at 1406. "It was concluded that tuberculosis infection was acquired prior to the initiation of therapy in the index cases and that once therapy was initiated there was no appreciable risk of new contacts acquiring infection from the index case even during the first few days of therapy." Id.

The dangerous carrier is someone who has the symptoms, conceals them and delays seeking medical care because of the fear of adverse consquences, such as a loss of employment. Once medical care is sought, the danger of infection is removed by the provision of chemotherapy (and a short period of isolation, in a minority of cases, if necessary). Removing the fear of permanent

job loss encourages prompt treatment.[4/] Thus, protection of the long range employment rights of tuberculosis patients decreases the possibility of infecting others and advances public health protection.

Medical opinion is unanimous that the public is protected from transmission of tuberculosis by treatment of the patient, and that isolation is necessary only in limited cases, usually for short time periods. The Guidelines for Work for Patients with Tuberculosis of the American Thoracic Society and CDC provide that "patients with all forms of tuberculosis should be encouraged to continue with or to

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4/ Since all states require reporting of tuberculosis, a patient cannot seek treatment without his/her condition becoming known to public authorities, who are usually charged with the responsiblity for taking action to prevent communication. See e.g., Fla. Stat. Ann. §381.23 (1986); 10 NYCRR §§2.6(c), 2.17, and N.Y. Public Health Law §§2101-2105.

return to their previous activities as soon as they are physically able." American Thoracic Society, etc., Guidelines, supra, at 160. "Criteria for return to work should always be individualized." Id. The strongest evidence that tuberculosis does not warrant the permanent exclusion of teachers from employment in schools is found in the report of the Child Day Care Infectious Disease Study Group of the Centers for Disease Control. Public Health Considerations of Infectious Diseases in Child Day Care Centers, 105 J. Pediatrics 683 (Nov. 1984). Even though the pre-school population of day care centers is the most susceptible to the disease, persons with active tuberculosis may resume activities at these centers when health officials state that the patient is no longer contagious. Id. at 693. Even persons who test positive for tuberculosis infection in routine

screening tests may continue to be employed in a day care center, although preventive chemotherapy may be appropriate. Id.; see also American Thoracic Society, etc., Guidelines, supra at 160.

The medical facts about tuberculosis thus demonstrate that public health concerns are best served by early detection, appropriate treatment and follow-up testing to ascertain when the stage of infectivity has passed. Typical cases require that the patient be excluded from normal interactive situations such as work or school for only brief periods of time.

2. COMMUNICABLE DISEASES ARE NOT PER SE EXCLUDED FROM COVERAGE UNDER SECTION 504.

The threshold legal question in this case is whether a disabling condition which would otherwise fall within the statutory definition in 29 U.S.C. §706(7)(B) (Supp. V 1982) must be excluded per se from the scope

of the Act if that condition is ever communicable. The District Court concluded that Respondent "suffers a handicap" but, based solely on speculation, held that contagious diseases are not handicaps within the meaning of Section 504.[5/] The Court of Appeals correctly reversed. Arline v. School Board of Nassau County, 772 F.2d 759, 764 (11th Cir. 1985). Although this Court accepted review of the first question

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5/ Ruling from the bench, the trial court stated:

> [T]he Court hereby finds that [Ms. Arline] is not such a handicapped person. No question that she suffers a handicap and it is most unfortunate that she suffers or did suffer from this particular infectious tuberculosis, but it's difficult for this Court to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person as that act has been implemented and decided by the various courts. I'm aware that the courts have held that alcoholism, cancer, blindness, various other things, have been determined to be handicapped persons, but it's just the Court's opinion that an infectious disease such as the plaintiff in this case had, in my opinion, does not fall within that handicapped definition.

Petition for Certiorari, App. C-2.

presented, both Petitioner and amicus the Department of Justice have abandoned defense of the per se exclusion of communicable diseases which was the basis of the District Court's opinion.[6/] However, this Court granted certiorari on that question and it remains in the case.

Petitioners abandoned the District Court's rationale for good reason. Nothing in the language or legislative history of the Act suggests that communicability alone negates its applicability. Questions about possible risk to others which are raised by the nature of the disability are properly resolved, not by a tortured interpretation of the Act's definition, but by a reasoned

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6/ "An individual who is disabled with an infectious, contagious disease surely may be a 'handicapped individual' within the meaning of the Rehabilitation Act." Brief of Department of Justice. Petitioner now argues not that the definition be interpreted to exclude all those with contagious conditions, but only "carrier[s] of a contagious disease who demonstrate[s] no external manifestations of a physical or mental impairment." Brief of Petitioner at 26.

analysis of its "otherwise qualified" provision. The object is to determine whether the employment of someone with a handicap such as Ms. Arline's creates an appreciable risk to herself or others which renders her unqualified to perform the designated task. See infra at 42-58.

In 1977, the then Department of Health Education and Welfare promulgated the major contemporaneous regulations which construed the definition of handicap in Section 504 to include diseases as well as loss of limb or function.7/ The Department specifically

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7/ The regulations provide:

"Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 CFR §84.3(j)(2).

Additionally, the Department's analysis of the regulation stated:

(cont'd next page)

rejected suggestions received during the public comment period to narrow the reach of the definition of "handicapped person," stating:

> The most common recommendation was that only 'traditional' handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicapped.

45 C.F.R. 84 App. A at 310 (1985)

These agency regulations are, of course, entitled to special deference in determining the scope of coverage intended by Congress. Congress amended the Act again in 1978; and, as this court has noted, except for what was

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"The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism." 45 C.F.R 84 App. A. at 310 (1985) (emphasis added).

specifically changed, these "1978 Amendments to the Act were intended to codify the regulations enforcing §504." Alexander v. Choate, ___ U.S. ___, 83 L.Ed.2d 661 at 674 n. 24 (1985), citing Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984). The 1978 amendments are particularly significant with respect to arguments urging a limited conception of the meaning of handicap. Focussing carefully on the expansive approach in the regulations, Congress specifically altered the Act's definition to limit coverage in cases involving alcoholism and drug abuse. 29 U.S.C. §706 (7)(B)(Supp. V 1982). Congress could have, but specifically did not, exclude diseases or categories of diseases when it revised the definition in 1978.8/

8/ Congress's failure to alter an administrative agency's interpretation of a statute, particularly in the face of a longstanding agency interpretation, (cont'd next page)

Moreover, the agency's construction has been validated by what amounts to a consensus among the federal courts that diseases properly fall within the scope of the Act. Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (epilepsy); Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983) (dyslexia); Treadwell v. Alexander, 702 F.2d 973 (11th Cir. 1983) (heart disease); Bentivegna v. U.S. Department of Labor, 694 F.2d 619 (9th Cir. 1982) (diabetes); Pushkin v. Regents of the University of Colorado, 658 F.2d 1392 (10th Cir. 1981) (multiple sclerosis); and New York Assn. for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979) (retarded children with hepatitis-B viral infection). The

creates a strong presumption in favor of the agency's interpretation. Guardians Association v. Civil Service Comm'n, 463 U.S. 582 (1983); Zemel v. Rusk, 381 U.S. 1 (1965); U.S. v. Rutherford, 442 U.S. 544 (1979); Costanzo v. Tillinghast, 287 U.S. 341 (1932). This presumption is further strengthened when Congress has taken other action to amend the statute. Sure-Tan v. NLRB, 467 U.S. 883 (1984).

diseases analyzed by the courts in these cases include ones which are communicable (hepatitis-B virus) and degenerative (multiple sclerosis).

Nothing in the legislative history supports the argument that Congress intended a distinction among kinds of diseases -- whether based on communicability or any other factors -- to silently alter the definition. Cf. Consolidated Rail Corp v. Dorrance, 465 U.S. 624, 631-4 (1984). Having rewritten the definition to extend its reach, having known of the enforcement agency regulations, and then having carved out a small exception to that scope, Congress indicated with the greatest possible clarity its endorsement of a broadly-defined protected class.

3. DISCRIMINATION BASED ON AN INHERENT CHARACTERISTIC OF A HANDICAP -- SUCH AS COMMUNICABILITY -- IS DISCRIMINATION BASED ON A HANDICAP.

Having abandoned the per se exclusion

argument, Petitioners and the Department of Justice now seek instead to block the applicability of Section 504 to certain conditions by declaring one element of some diseases, the possibility of communicability, to be a separate characteristic for which discrimination is never unlawful.9/

They construct this theory by arguing that if an employer shows fear of contagiousness -- whether rational or irrational -- to be the reason for exclusion, there can be no claim of discrimination under Section 504. Contagiousness, however, is an inherent (although often dormant) characteristic of

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9/ The fullest statement, and apparent origin, of this position is found in the Justice Department's policy opinion on the applicability of Section 504 to AIDS and related conditions. U.S. Justice Department, Office of Legal Counsel, Memorandum for Ronald E. Robertson, General Counsel, Department of Health and Human Services, Re: Application of Section 504 of the Rehabilitation Act to Persons wth AIDS, AIDS-related Complex, or Infection with the AIDS Virus, cited as Justice Department AIDS Opinion. A copy has been lodged with the Court by Petitioner.

tuberculosis and many other diseases. It is therefore not only a semantic trick to try to distinguish an inherent characteristic from the disease of which it is a part but a clear contravention of Congressional intent as well.

The correct approach to Section 504 is to recognize that Ms. Arline is a handicapped person within the meaning of the Act and then to inquire into the risks to others arising from her handicap as part of the determination whether she meets the "otherwise qualified" requirement of the Act. As shown below, such an analysis avoids an all or nothing determination in favor of a balanced approach which protects the public from danger and the individual from discrimination arising from baseless fears and prejudices.

The inherent characteristics of a disease comprise part of the impairment,

actual or perceived, associated with the disease. If a condition satisfies the statutory criteria for a handicap, the application of Section 504 cannot be negated by treating the disease's intrinsic elements as coincidental physical descriptors, like height or weight or eye color.

The courts which have interpreted Section 504 have recognized that the inherent characteristics of a physical or mental condition are not separable from the condition for the purpose of defining "handicapped person." Such cases have included situations in which some elements of a handicap posed a threat of harm to others. Both the Second Circuit and the Fifth Circuit have held that plaintiffs met the threshold burden of establishing handicap when a mental illness rendered them incapable of handling stressful situations, involving a risk to co-workers and clientele. Doe v. New

York University, 666 F.2d 761, 775 (2d Cir. 1981); Doe v. Region 13 Mental Health-Mental Retardation Commission, 704 F.2d 1402, 1408 rehearing en banc denied, 709 F.2d 712 (5th Cir. 1983). Finding that a handicap existed did not prevent these courts from examining individual facts and concluding that the persons were appropriately excluded because the risk they posed to others was significant. Compare Pushkin v. Regents of the University of Colorado, 658 F.2d 1372, 1388 (10th Cir. 1981) in which the side effects of drugs necessary for treating multiple sclerosis were analyzed as aspects of a handicap which could properly be weighed in determining job fitness, but did not render Section 504 inapplicable.

To adopt the Justice Department's theory that a characteristic of a disease can be disconnected from all other aspects of the handicap would open the door to wholesale

evisceration of the Act. The Justice Department theory is indistinguishable in its structure from the argument that Section 504 covers discrimination based on blindness or hearing impairment, but does not apply if the defendant asserts a risk of danger to others from the plaintiff's lesser ability to see or hear. See, Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1977). The correct inquiry is whether a significant risk to other persons actually exists. To accept the proposition that merely showing a fear of danger precludes review would nullify precisely the effect which Congress intended the Act to have.

The practical implications of adopting the Justice Department's proposal would be enormous. Tens of millions of Americans could be denied employment or participation in federally funded programs because at one time in their lives they had a communicable

disease. For example, a child who contracted tuberculosis as an infant could be forever barred from attending public school and relegated to home instruction for the child's entire schooling, even though the child was cured, i.e., no longer had an active case, and could not communicate tuberculosis to others. Indeed, virtually the entire population could be subject to irrational discrimination based on medically unsupportable allegations of "fear of contagion" because almost all adults carry the herpes virus that accompanies chicken pox and which may manifest itself in adults in the disease known as shingles. Control of Communicable Diseases in Man (Benenson, ed. 1985) 70. Chicken pox presents a classic example of viral latency in the ability of the variella zoster virus to cause recurrent clinical disease in the form of shingles decades after infection. Another member of

this same virus family, herpes simplex virus type 2, also causes a recurrent communicable disease of wide occurrence. Guinan et al, Epidemiology of Genital Herpes Simplex Virus Infection, in 7 Epidemiology Rev. 140 (1985). Recent studies indicate that a quarter or more of the adult population, more than 40 million people, are carriers of genital herpes. Eckholm, "Genital Herpes is More Common but the Alarm is Diminishing," New York Times, July 8, 1986 at C-1. Initial public reaction to knowledge about the disease led to actions similar to those triggered by AIDS, such as attempts to ban children with herpes from schools. "Scientists describe the[se] efforts . . . as preposterous." Id.

Schoolchildren with AIDS present another example of the wrongheadedness of the all-or-nothing approach of Petitioner and the Department of Justice. The Centers for

Disease Control have stated that most HTLV-III/LAV-infected schoolchildren can be allowed to attend school normally, after an individualized determination of what would be the best educational setting based on the behavior, neurologic development, and physical condition of the child and the expected type of interaction with others. U.S. Centers for Disease Control, 34 Morbidity and Mortality Weekly Report 106-109 (Aug. 30, 1985). Efforts to block school attendance by these children have been rejected by the courts. In re District 27 Community School Board v. Board of Education of City of New York, 130 Misc. 2d 398 (N.Y. Sup.Ct. 1986); Bogart v. White, No. 86-1444 (Clinton Cty, Ind., Circuit Ct., April 10, 1986). In New York City, where the CDC recommendations for an individualized examination of each case are followed, school officials recently announced that six of the

13 children with AIDS were to be admitted to the public schools. Perez, "6 AIDS Children to Attend Schools, City Officials Say," New York Times, Aug. 26, 1986 at p. B-1.

The enormous number of people vulnerable to discrimination based on erroneous fears of contagion, by virtue of their simply being carriers of a virus or other communicable disease, demonstrates the need for statutory protection. Section 504 was designed to protect against such irrational and unfair treatment by recipients of federal funding.

4. DURING PERIODS WHEN THEIR TUBERCULOSIS IS NON-COMMUNICABLE, PERSONS SUCH AS RESPONDENT REMAIN HANDICAPPED BECAUSE OF THEIR HISTORY WITH THE DISEASE AND THE PERCEPTION THAT THEY ARE IMPAIRED.

The record indicates that Ms. Arline's tuberculosis was non-communicable by 1981. J.A. at 20, 31. The record is unclear as to when her communicable period in 1978-9 ended. She remained covered by Section 504

throughout the time at issue here because of her past impairment and because of the perception of impairment.

Congress could not have been more clear in its intention to extend Section 504's coverage to someone in Ms. Arline's position. 29 U.S.C. §707(7)(B)(ii) defines handicapped persons to include those with a record of impairment. It was added to the statute in 1974 specifically "to make clearer that the coverage of Sections 503 and 504 extends to persons who have recovered -- in whole or in part -- from a handicapping condition." Senate Com. on Labor and Public Welfare, Rehabilitation Act Amendments of 1974, Sen. Rep. No. 93-1297, 93rd Cong. 2d Sess., reprinted in 4 U.S. Code Cong. & Admin. News 6373, 6389 (1974). (Emphasis added.) Ms. Arline is just such a person.

Additionally, Ms. Arline meets the statutory definition of handicapped person

because she "is regarded as having . . . an impairment." 29 U.S.C. §706(7)(B)(iii). This case well illustrates that even when a disease is in remission, a person can be perceived as having a physiological disorder which impairs the major life activities of working and social interaction. When a person is believed, even if wrongly, to be substantially limited in her capacity for social interaction, and hence work, because of a handicapping disease (or an inherent characteristic of such a disease), then she is "handicapped" within the meaning of subsection (B)(iii). Thus, the fear of communicability, when it is associated with a condition which otherwise meets the statutory definition of handicap, far from being a rationale for failing to apply Section 504, is instead an indication that the Act must be invoked. As noted above, finding that the plaintiff's situation satisfies these

definitional requirements merely leads to consideration under the "otherwise qualified" test of what the medical ramifications of the asserted contagiousness really are. But the central point is nonetheless clear: irrational employer attitudes toward handicapped workers are precisely what Section 504 is intended to protect against.

The Justice Department's argument that a perception of contagiousness does not substantially limit a major life activity because contagion is not "disabling" is therefore not only irrational on its face, but represents a flagrant misreading of Section 504. By attempting to limit "disabling" to "adverse effects on an individual's ability to perform a physical or mental task," brief of the Department of Justice, the Justice Department attempts to resurrect the narrow definition of handicap in the 1973 version of the Act and ignores

the much broader scope of the current law, which rejects such a task-based focus. The Act originally defined "handicapped person" based on handicaps to employment and capacity to benefit from vocational services. Rehabilitation Act of 1973, Pub. L. 93-112, §7, 87 Stat. 359 (1973). Finding that definition "far too narrow and constricting," Congress in 1974 substituted an entirely new concept "focus[ing] on substantial limitations of an individual's functioning or of one or more of an individual's major life activities." Summary of Report of Senate Comm. on Labor and Public Welfare, 120 Cong. Rec. 30540 (Sept. 10, 1974).

Congress broadened the definition in 1974 to include "those persons whose mental or physical condition <u>does not substantially limit their life activities and who thus are not technically within [subsection (B)(i)]</u> . . . [but who] may be subjected to

discrimination on the basis of their being regarded as handicapped." Senate Rep. 93-1297 in 1974 U.S. Code & Admin. News at 6389-6390 (emphasis added). As this Court has recognized, a person described by this provision "may have no actual incapacity at all," Southeastern Community College v. Davis, 442 U.S. 397, 405, n.6 (1979), yet still be undeniably covered by the Act.

The inability to interact with others can be the impairment caused by a handicap, even when the handicap causes no impact on the intellectual ability or physical strength necessary for the job. This is often true of emotional or mental illnesses, which are covered by the Act. See, e.g., Doe v. New York University, 666 F.2d at 775. DHHS regulations interpret Subsection (B)(iii) to include such situations,10/ giving as one

10/ 45 C.F.R. 84.3(j)(2)(iv) provides:
"Is regarded as having an impairment" means (i) has a physical or mental impairment that
(cont'd next page)

example of a handicap, "cosmetic disfigurement." 45 C.F.R. 84.3(j)(2). The curtailment of social interaction, because of the attitudes of others, is precisely the impairment caused by cosmetic disfigurement.11/ If a lawyer suffers severe burns to the face but is perfectly capable of doing legal research, writing briefs and documents, and arguing in court, denial of employment based on fears of public reaction to the disfigurement would establish a prima

does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (ii) has a physical or mental impairment that substantially limits its major life activities only as a result of the attitudes of others toward such impairment; or (iii) has none of the impairments defined in paragraph (b)(1) of this section but is treated by a recipient as having such an impairment...."

11/ The Justice Department weakly tries to explain away the inclusion of this example in the DHHS regulations by calling it "anomalous." The Department tries to cloud the scope of handicap-based discrimination covered by the Act by making irrelevant comparisons to non-handicap-related conditions, but the distinction is clear; cosmetic disfigurement is a handicap even though common homeliness is not.

facie case of discrimination based on handicap. When a limitation on major life activities flows directly from a physical or mental impairment as defined by the Act, Section 504 is applicable whether the limitation exists physiologically or is created by the attitudes of others.

5. A PERSON HANDICAPPED BY A COMMUNICABLE DISEASE MAY BE "OTHERWISE QUALIFIED" UNDER SECTION 504 IF THERE IS NO SIGNIFICANT RISK OF TRANSMISSION OF THE DISEASE.

The Court of Appeals correctly remanded this case to the trial court for "further findings as to whether the risks of infection precluded Ms. Arline from being otherwise qualified' for her job." Arline v. School Board of Nassau County, 772 F.2d at 765. This Court should affirm the order to remand so that the lower court can ascertain the exact nature of the risk posed by Ms. Arline's health condition.12/ Additionally, this Court should assist the

12/ See p. 43.

lower court by clarifying the standard by which to evaluate the evidence presented.

The correct standard to apply was used by the Second Circuit in a case involving the risk of hepatitis-B transmission by or among retarded children. In New York Assn. for Retarded Childen v. Carey, 612 F.2d 644, 650 (2d Cir. 1979), the Court struck down a board of education policy segregating those retarded children who carried the hepatitis-B virus on the ground that

> the Board was unable to demonstrate that the health hazard posed by the hepatitis-B carrier children was anything more than a remote possiblity. There has never been any definite proof that the disease can be communicated by non-parenteral routes such as saliva. Even assuming

12/ Alternatively, the Court could dismiss the writ of certiorari on the second question presented as improvidently granted, to allow development of the record. See, e.g., Taggart Weinaker's, Inc., 397 U.S. 223 (1970); Wainwright v. City of New Orleans, 392 U.S. 598 (1968) (Harlan, J. concurring). As discussed below, p. 52-55, the record is unclear as to the medical facts or the recommendation of the public health official who reviewed Respondent's medical history.

that there were, the activities that occur in classroom settings were not shown to pose any significant risk that the disease would be transmitted from one child to another.

The standard of significant risk of actual transmission, coupled with an examination of the seriousness of the disease, appropriately parallels the criteria for determining if the "otherwise qualified" requirement is met which have been developed by the Courts of Appeals in other cases in which risk of harm was an issue.[13/] In Doe v.

13/ Such a standard also parallels the Act's criteria for drug and alcohol abusers, who are protected against employment discrimination unless they are unable to perform the duties of the job because they "would constitute a direct threat to property or the safety of others." 29 U.S.C. §706(7)(B)(emphasis added). It is the standard used by the Department of Health and Human Services, even after the Justice Department issued its memorandum on AIDS, in finding noncompliance with Section 504 by a hospital which fired a health care worker. "[W]here the employee is a health care worker with a transmissible disease, the hospital's medical directors could, in consultation with the employee's personal physician, make a determination on an individual basis whether the infected employee can adequately and safely perform patient-care duties. The Office for Civil Rights recognizes that in cases involving health care workers who have such diseases the employer must be given the (cont'd next page)

New York University, 666 F.2d 761 (2d Cir. 1981), the Court analyzed the claim of a medical student with a history of mental illness in terms of whether there was "a significant risk of . . . recurrence," i.e., "a significant risk of harm to [herself] or others," especially "[i]n view of the seriousness of the harm inflicted in prior episodes." 666 F.2d at 777. In Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985), involving a letter sorter machine operator who had epilepsy, the Ninth Circuit used the standard of whether "the applicant [is] presently qualified to perform the essential requirements of the job without a reasonable

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necessary latitude to fully and fairly evaluate any significant risks which may be posed by or to the employee." Letter of Marie Chretien, Regional Manager, Office of Civil Rights, August 5, 1986, Re: Complaint No. 04-84-3096 (emphasis added). (A copy of this letter has been lodged with the Court.) It is also comparable to the Occupational Safety and Health Administration Act standard, which requires workplaces to be "free of recognized hazards that are causing or likely to cause death or serious physical harm to employees." 29 U.S.C. 654(a)(1).

probability of substantial injury to the applicant or others." Id. at 1423. The court specifically rejected a "mere 'elevated risk' standard [as] not sufficient to ensure handicapped people's right to employment which complements their abilities. " Id. at 1422 (citations omitted). In Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983), the Third Circuit ruled that a school bus driver could not be dismissed for needing a hearing aid because the state failed to prove that use of such a device -- although not perfect in its avoidance of impairment to hearing -- did not present "an appreciable risk to the safety and control" of children riding school busses. Id. at 234.

These cases demonstrate that determining significant risk is well within the capacity of the courts.

> [T]he courts are . . . assigned a sensitive task, and that task is to ensure that the established legal standards -- constitutional and statutory -- are followed by government agencies. To permit the factual determinations of these agencies to go unchallenged may be to neglect this task, for the facts will often be dispositive, and the question of compliance with prevailing legal standards will often be determined by the manner in which the agency has found these facts.

New York Association for Retarded Children v. Carey, supra 612 F.2d at 648.

Moreover, legitimate public health interests benefit when stereotypes, misinformation, and inadequately-supported medical opinions are not permitted to form the basis for discriminatory acts.

The court's role and the standard utilized in reviewing employment actions under Section 504 should be the same whenever endangerment is an issue, regardless of whether the defendant alleges risk of contagicusness; risk of harm to others caused by blindness, deafness, mental illness, or other handicaps; or risk of future injury.[14/] All these claims require close analysis of

14/ See p. 48.

the facts as to the particular handicapped person; the particular job duties and environment; the specific nature, probability and consequence of the risk; and the likelihood of harm actually occurring. Without the courts to perform this crucial role, the intent of Congress to prevent discriminatory employment policies toward disabled persons capable of working will be flouted, and public respect for serious, medically justified public health concerns will be diminished.

Under the standards developed by the Courts of Appeals, employment or program participation will not be appropriate in some

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14/ The question is whether a plaintiff is qualified at the time of the employer's action, not whether he or she will be qualified at some future time. "Any qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily . . . . [A]llowing remote concerns to legitimize discrimination against the handicapped could vitiate the effectiveness of section 504 of the Act." Bentivegna v. United States Department of Labor, 694 F.2d 619, 622-3 (9th Cir. 1982).

instances. See, e.g., Doe v. New York University, supra; Doe v. Mental Health-Mental Retardation Commision, 704 F.2d 1402, rehearing en banc denied 709 F.2d 712 (5th Cir. 1983); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977). The application of these standards leads to the same result which this Court reached in Southeastern Community College v. Davis, 442 U.S. 397, 403 (1979). If the defendant can prove that a significant risk of harm is caused by the handicap, then the plaintiff is not otherwise qualified unless a reasonable accomodation by the defendant can remove the risk.

Amici herein agree with the position of the State of California and other states, Brief Point II, that "a plaintiff should not be precluded from rebutting the evidence offered by the defendant's decisionmaker and demonstrating that the decision was based on incorrect information or assumptions . . ."

Reliance on the advice of a physician cannot alone determine that a plaintiff was not otherwise qualified for a program. Many corporations employ "company doctors" who are not always in the position to be the most objective decision maker; the decision to exclude an applicant is generally the safer one from the standpoint of the physician's self interest.15/ Moreover, physicians like all humans, may err, witness the misstatement by Dr. McEwen herein that children of elementary school age are more susceptible to

15/ In describing the probative value of the testimony of a company doctor concerning the employability of a person with epilepsy, Kovarasky and Hauck state: "While the acceptance of this medical testimony is proper and entitled to careful evaluation, arbitrators are aware. or should be aware, that company doctors testifying are expected to display allegiance to the firm. Many company doctors are unnecessarily conservative when evaluating employees, choosing to err on the side of their employers." Kovarsky and Hauck, Arbitation and the Epileptic, Lab. L. J. 597, 602 (September, 1977). See generally, Dinman, The Loyalty of the Occupational Physician, 54 Bull. N.Y. Acad. Med. 769 (1978); Tabershaw, "Whose Agent is the Occupational Physician," 30 Archives Envt'l Health 412 (1975).

tuberculosis than older children or adults, a position not generally accepted by research, which finds no difference. See supra, p. 9.

Indeed, even lawyers make mistakes. The Department of Justice recently cited a prominent research scientist in support of the statement that "there are sure to be" cases in the future of transmission of the AIDS virus by casual contact. Justice Department Memorandum at 13. Shortly afterward, that scientist demanded and got a letter of apology from the Department, after re-iterating that "casual transmission such as is likely to occur in workplace settings will never pose a significant risk to uninfected co-workers." Pear, "U.S. Apologizes to AIDS Researcher," New York Times, July 23, 1986, p. D20. See also, U.S. Centers for Disease Control, "Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus

Type III/Lymphandenopathy-Associated Virus in the Workplace," 34 Morbidity and Mortality Weekly Report 681-695 (November 15, 1985).

6. BECAUSE THE RECORD IS UNCLEAR AS TO WHETHER THERE WAS SUFFICIENT JUSTIFICATION FOR TERMINATING RESPONDENT RATHER THAN SUSPENDING HER DURING HER CONTAGIOUSNES PERIOD, THE COURT OF APPEALS CORRECTLY REMANDED FOR A HEARING.

The Court of Appeals in this case was correct in remanding to the District Court to determine if the Respondent was "otherwise qualified" for her position as teacher. A suspension during the contagious period and the period necessary to verify that there is no longer any reasonable risk of contagion is justified as necessary to protect others. Removing an individual permanently from the work force is almost always unwaranted by scientific knowledge or public health concerns. A period of leave is common in

school systems, which offer sabbaticals,[16] sick leave, maternity leave, administrative leaves, and regularly utilize substitute teachers. State laws may mandate leaves for teachers or grant discretion to the school authorities with respect to leaves, and leaves may be available as of right under collective bargaining agreements. Fla. Stats. Ann. §231.39 (Supp. 1986).

In rare cases, there may be special factors that might justify differential treatment. See Allen v. Heckler, 780 F.2d 64,69-71 (D.C.Cir. 1985). Whether Respondent is such a case cannot be determined on this record. As the Court of Appeals noted herein (772 F.2d at 765), "the district court made no findings resolving the numerous factual disputes" as to whether Respondent was otherwise qualified. The Court of Appeals

16/ Florida law authorizes one year sabbaticals. Fla. Stats. Ann. §231.424 (Supp. 1986).

defined these issues as (1) the risks entailed in retaining Arline in her elementary school position; (2) risks in teaching less susceptible individuals and (3) the costs involved in accomodating Respondent in a new position.

The expert testimony in the case comes soley from Dr. McEuen, the Assistant Director of the Community Tuberculosis Control Service of the Florida Department of Health. She testified that she was "fairly confident" that Respondent will not have another relapse (J.A. 31), that she was negative in her 1981 culture (two years after the positive tests that led to her dismissal) and no positive test was reported since. Dr. McEuen also testified that at the time of trial the "possibility of her infectiousness is remote." (J.A. 42.)

At the same time, there are special factors applicable to Respondent which

require consideration, particularly the recurrence of the disease three times in a two year period. This may result either from Respondent having a strain of tuberculosis baccilli which was resistant to the drugs prescribed or from her failure to properly follow the prescribed regimens. The record is silent on this question. If the recurrence was the result of drug resistance, the medically indicated course is to vary the medication, and such a practice usually results in a cure and the end of the contagious period.

The record is also unclear as to whether Dr. McEuen ever recommended permanent removal of Respondent as an elementary school teacher. She testified that "when the last culture was reported positive, which I think was February of 1979, and it was my recommendation at that time that she not continue to teach third grade students."

(emphasis added.) (J.A. 13, but see J.A. 15). She was primarily concerned about the possibility of relapse, and was strongly influenced by the fact that elementary school students are with the same teacher in the same classroom all day, whereas older students and persons in adult education move from classroom to classroom and have a lower exposure to any one teacher. J.A. 16-19. Indeed, Dr. McEuen appeared to regard teaching older students as an acceptable risk even during the contagious period, J.A. 16, although the questions and answers were never precise as to time frame. Petitioner followed a practice of allowing teachers not certified at a particular grade level to teach nevertheless. J.A. 56-57. Thus, there is at least prima facie evidence that a reasonable accomodation could have been made consistent with the recommendation of the medical expert relied upon by Petitioner.

The determination of whether a person who has, or may carry, a contagious disease is otherwise qualified for a position or program depends on individual factors, rendering impossible a yes or no answer to the second question certified by the Court. Amici herein agree with the American Medical Association that the appropriate factors are (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious?), (c) the severity of the risk (what is the potential harm to third parties?) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. American Medical Association brief at 19.

No findings were made in this case on these or any other criteria. A remand in accordance with the opinion of the Court of Appeals is therefore appropriate. As the Court of Appeals stated, the trial court

should determine "whether the defendant's justifications reflect a well informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexsive reactions grounds in ignorance or capitulation to public prejudice." 772 F.2d at 765. Accord: Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983); New York Ass'n. for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979).

7. PROTECTION UNDER SECTION 504 AGAINST PERMANENT EXCLUSION FROM EMPLOYMENT OR OTHER FEDERALLY FUNDED PROGRAMS OF PERSONS WHO HAVE HAD A CONTAGIOUS DISEASE WILL NOT INTERFERE WITH THE ENFORCEMENT OF PUBLIC HEALTH LAWS.

The protection afforded by Section 504 to victims of communicable diseases does not interfere in any way with the operation of public health laws which are designed to protect the public against the spread of

infectious disease. These laws are well nigh universal and are generally of two kinds -- reporting and isolation. Reporting statutes in no way deny anyone participation in the benefits of, or discriminate under, any program or activity. They only require that physicians, laboratories, and other specified persons or institutions report identified cases of communicable disease to public authorities.

Statutes relating to isolation may be general in nature, authorizing isolation during communicable periods, see, e.g., 42 U.S.C. §264(d), or they may relate to specific activities and provide for exclusion of persons with communicable disease. State laws applicable to education authorize exclusion of students in general terms ("attendance of the child to be inimicable to the welfare of other children," Alaska Stat. §14.30.045(41) or with specific reference to

communicable disease, e.g., Wisc. Stat. Ann. 143.12), or to tuberculosis specifically, e.g., Wisc. Stat. Ann. §143.06. Florida law permits isolation of a person with "an active case of tuberculosis." Fla. Stat. Ann. §§392.25, 392.26(2)(a) and (3)(a). These tuberculosis-specific statutes may specify that which is generally accepted in practice, that the exclusion from school of a person with tuberculosis applies only during the contagious stage. See, e.g., the Wisconsin statute requiring a physician's certificate that the teacher is "free from tuberculosis in a communicable form." Wis. Stat. Ann. §143.16.

Section 504, properly applied, does not invalidate or threaten the efficacy of these laws. The courts have uniformly followed the guidelines of the Equal Employment Opportunity Commission regulation that to be "otherwise qualified" a handicapped person

must be able to

> ...perform the essential functions of the position in question without endangering the health and safety of others.

29 C.F.R. §1613.702(f). See, e.g., Southeastern Community College v. Davis, 442 U.S. 397 (1979); Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Doe v. Region 13 Mental Health-Mental Retardation Commission, 704 F.2d 1402 rehearing en banc denied, 709 F.2d 712 (5th Cir. 1983); Strathie v. Dept. of Transportation, 716 F.2d 227 (3d Cir. 1983); Doe v. New York University, 666 F.2d 761 (2d Cir. 1981). Where there is a real risk that the health and safety of others is endangered, the courts have had no trouble in upholding the action of public health officials. See e.g., Jacobson v. Massachusetts, 197 U.S. 11 (1905); S. Burris, Fear Itself: AIDS, Herpes and Public Health Decisions, 3 Yale Law and Policy Rev. 479 (1985). The careful balance between

protection of the public and the right of handicapped individuals to be free of irrational discrimination related to their handicap is maintained by the requirement of Section 504 that actions which deny handicapped persons employment or participation in federally funded programs out of fear for the safety of others be based on a proven likelihood of appreciable risk. See, e.g., Strathie v. Dep't of Transportation, 716 F.2d at 234 (appreciable risk to others); Mantolete v. Bolger, 767 F.2d at 1, 4, 22 (reasonable probability of substantial harm); Doe v. New York University, 666 F.2d at 775-777 (reasonable precautions or requirements; substantiality of the risk); Doe v. Region 13 Mental Health-Mental Retardation Commission, 704 F.2d at 1412 (reasonable justification). Under this standard, the tuberculosis patient who is actively infectious can be excluded from

employment or program participation for so long as a real risk of casual transmission exists, but no longer. Such a standard satisfies both public health concerns and the mandate of Section 504. Protecting the long-range employment rights of persons with tuberculosis will encourage prompt treatment, the most effective method of prevention.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the Court of Appeals and remand this case for further factual findings based on the standard of review discussed herein.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1986

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, ET AL,
Petitioners,

v.

GENE H. ARLINE,
Respondent.

On Writ of Certiorari to The United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, THE NATIONAL HEMOPHILIA FOUNDATION, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS AND THE AMERICAN DIABETES ASSOCIATION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether the record supports the holding of the court of appeals that Gene Arline is "handicapped" within the meaning of the Rehabilitation Act?

2. Whether persons who allege that they have been *incorrectly* regarded as having a handicap that is dangerously communicable in the workplace should be precluded as a matter of law from being "otherwise qualified" for the job of elementary school teacher?

3. Whether the doctrine of reasonable accommodation encompasses modifications in an employer's program such as job reassignment that do not so fundamentally alter the nature of the program as to compromise its essential nature?

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No. 85-1277

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INTEREST OF AMICI

THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES (ARC) is a national voluntary organization of parents, families, friends, and persons with retardation that since its founding in 1950 has defended the rights and interests of persons with retardation. The Association is organized into over 1,300 state and local

chapters. Many former and present residents of segregated retardation institutions, as a result of their unnecessary confinement in dangerous environments, have acquired such conditions as hepatitis B, which are not communicable by casual contact. ARC's interest here is to preserve the integrity of Judge Newman's persuasive opinion for the court of appeals in *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979), construing Section 504 to prohibit the exclusion of persons with retardation who were hepatitis B carriers from integrated educational programs in the public schools, on the basis that the school board there failed to show a real risk of communicability. That decision has been assiduously followed by other state and federal courts and by local school boards throughout the nation. Unless the decision of the court of appeals here is affirmed, the well-reasoned *Carey* decision may be placed in jeopardy, as may be the right of thousands of formerly and currently institutionalized children to attend integrated educational programs.

THE NATIONAL HEMOPHILIA FOUNDATION (NHF) is the only organization in the United States exclusively devoted to improving the welfare of all persons affected by hemophilia and related bleeding conditions so that each can fulfill their individual potential. Serving over 20,000 persons nationwide with hemophilia and related conditions, their families, fifty local chapters, and over 100 hemophilia treatment centers, NHF provides and supports: research; patient, public and professional education; and patient, family and community services. Hemophilia is caused by the inactivity of one of the blood proteins necessary for clotting. If internal bleeding is not treated by infusing a clotting factor derived from human blood, permanent damage, especially to joints, can result. Because of their frequent use of clotting factor, those with hemophilia are at greater risk of acquiring a

variety of bloodborne viruses that may cause such conditions as hepatitis and AIDS, neither of which is communicable by casual contact. Persons with hemophilia historically have experienced discrimination based on the unfounded belief that they can bleed to death from minor external cuts and scratches. NHF is concerned that, unless the decision of the court of appeals is affirmed, new discrimination will occur based on equally unfounded fears of communicability.

THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS (TASH) is the principal organization in the United States for professionals providing habilitative, educational and vocational services to all individuals with severe disabilities. TASH has more than five thousand members including parents, educators, therapists, doctors and other professionals, and handicapped consumers. The Association was founded in 1974 to implement the integration imperative of Section 504 and of the Education of the Handicapped Act, 20 U.S.C. § 1401, and to insure the provision of educational and habilitative services for severely handicapped persons, many of whom would be placed at risk of being excluded from those services if the decision of the court of appeals is not affirmed.

THE AMERICAN DIABETES ASSOCIATION (ADA) has over 800 chapters and affiliates and more than 220,000 members nationwide, including physicians, research scientists, nurses, dieticians, educators and consumers. ADA's purpose is to promote research and to improve the well-being of people with diabetes and their families. Despite the fact that over eleven million Americans have diabetes, the condition is widely misunderstood. Inaccurate perceptions of diabetes and unfounded fears and stereotypes concerning its manifestations often give rise to employment discrimination that may not be cognizable under Section 504 unless the decision of the court of appeals is affirmed.

SUMMARY OF ARGUMENT

1. The Court has granted certiorari on intensely factual questions. The first question, whether Gene Arline is "handicapped" within the meaning of the Rehabilitation Act, surely can be answered on this record. The district court determined that there was "[n]o question that she suffers a handicap," and the court of appeals ruled that she was handicapped since her condition could "significantly impair respiratory functions as well as other major body systems." Discriminatory treatment of persons with such conditions is cognizable under Section 504 and its implementing regulation, which "covers all types of physical and mental impairments."

2. The second question, whether Gene Arline is precluded from being qualified, or, conversely, whether she has been subjected to discrimination, is a factual question that is not susceptible to a decision on this record. Of course, no one here disputes that an employer may exclude, under the doctrine of "business necessity," any employee whose condition jeopardizes the health or safety of other employees or program beneficiaries. No such determination regarding Gene Arline was ever made by the district court, however, and the employer must be held to its burden — a burden well-settled by the cases of this Court — of establishing that proposition. The Court can provide important guidance regarding the proper framework to be followed in adjudicating claims such as respondent's by clarifying that the issue is not whether employers *can* exclude, but whether such exclusion must be justified by proof of facts in the specific case rather than by generalized, unsubstantiated fear. Indeed, insistence upon respect for sound, fact-based judgments from qualified state professionals enforcing the public health laws is exactly what Section 504 demands. Under the construction urged by petitioners and by the Solicitor General, Section 504 would not apply to this entire category of cases, no matter how irrational the

circumstances of exclusion, and employers would be permitted in unfettered fashion to exclude handicapped persons on the flimsiest of bases: the mere "belief that an individual is contagious — *whether reasonable or not*. . . ." Brief for the United States as Amicus Curiae 22-23 (emphasis added).

The consistent, contemporaneous, longstanding construction of Section 504 by the responsible enforcement agency explicitly incorporates well-established employment discrimination law that once a member of a protected group establishes that a practice has a discriminatory impact on that group, the burden shifts to the employer to show, on an individual basis, that its criteria are job-related. Since tuberculosis varies considerably from individual to individual in terms of its symptoms, its susceptibility to treatment, and its transmissibility, since the district court made no specific findings about Mrs. Arline's condition, and in view of the stigma, fear and prejudice historically imposed upon persons with tuberculosis, the Court should remand for an individualized determination of her qualifications.

3. The doctrine of reasonable accommodation may, depending on the circumstances, encompass such modifications in an employer's program as the reassignment of jobs, especially since such action may in any given case prove to be the simplest, least expensive, and most effective method of accommodating an employee's handicap. So long as the accommodation does not amount to such a "fundamental alteration in the nature of a program" that it would "compromis[e] the essential nature" of that program, *Alexander v. Choate*, 105 S.Ct. 712, 720 (1985), enforcement agencies and courts of equity are to be provided "substantial leeway," *id.* 723 n.24, in fashioning sensible accommodations that will enable handicapped employees to pursue their chosen professions.

ARGUMENT

I. The Record Supports the Holding of the Court of Appeals that Gene Arline Is "Handicapped" Within the Meaning of the Rehabilitation Act.

Section 7(7) of the Rehabilitation Act defines "handicapped individual" for the purpose of Section 504 to include "any person" with an "impairment which substantially limits one or more of such person's major life activities" or with "a record" or who is "regarded as having such an impairment." 29 U.S.C. §706(7)(B). The statute requires a case-by-case, factual determination of its coverage.

The record fully supports the holding of the court of appeals regarding coverage of Mrs. Arline.[1] The relevant regulation specifically defines the term "impairment" to include "respiratory" conditions such as hers. 45 C.F.R. §84.3(j)(2)(i);[2] *see* J.A. 7 (tuberculosis in most cases has "an effect upon the respiratory system in general").

Moreover, the regulation defines "major life activities" to include such functions as "breathing" and "walking" affected by a handicapping condition. 45 C.F.R. §84.3(j)(2)(ii);[3] *see* J.A. 7 ("Q. And is it the kind of illness which has the potential to limit a major life function such as breathing or walking or something such as that? A. It could, yes."). Mrs. Arline had a record

1. The question before this Court is whether the record supports the holding of the court of appeals, and the finding of the district court, that Mrs. Arline is "handicapped." Whether another finder of fact might rule differently on this record or even whether another case involving tuberculosis might require a different result are questions not before the Court.

2. After the breakup of HEW, the Department of Education recodified an identical regulation at 34 C.F.R. part 104. Since the court of appeals cites to the HEW (now HHS) rule, we shall continue to do the same.

3. This listing is expressly not exclusive since it refers to functions "such as" those listed. *Id.*

of tuberculosis in "an acute form in such a degree that it affected her respiratory system." J.A. 11. The record reveals that her tuberculosis precipitated her hospitalization. *Id.* 11-12. Indeed, the district court explicitly determined that there was "[n]o question that she suffers a handicap, . . . that she suffers or did suffer from this." Pet. App. C-2.[4]

Petitioners, however, challenge a holding the court of appeals never made. The court of appeals did *not* rule that Mrs. Arline's condition was a "handicap" because it was communicable. Rather, the court ruled that it was a "handicap" precisely and solely because it could "significantly impair respiratory functions as well as other major body systems." Pet. App. A-8. The question whether her condition *also* was or was regarded as communicable pertains to the legality of the exclusionary practice, *not* to the scope of the class protected by the statute.[5] As the Preamble to the regulation states, "[t]he regulation covers all types of physical and mental impairments." 42 Fed. Reg. 22677 (1977). The statute and its regulation do not limit coverage to all impairments except those that

4. While we do not share the view of the American Medical Association (AMA) that there are sufficient ambiguities on this record to require a remand on the question of the substantiality of the limitation imposed upon Mrs. Arline by her tuberculosis, Brief of the AMA as Amicus Curiae 16, we agree that that would be the appropriate action should the Court so conclude, especially since in any event a remand will be required to adjudicate the "otherwise qualified" issue.

5. There is no reason for the Court to address here the hypothetical posed by petitioners of "an individual suffering from a contagious disease [who] may not necessarily suffer from any physical or mental impairments. . . ." Pet. 14. Whether or not such a hypothetical person is "handicapped" should be decided on another day since Mrs. Arline does have the requisite "impairment" in her respiratory functions that does substantially affect her major life activities.

also are or are regarded as being communicable,[6] or to all handicapped persons except those who are free of any communicable conditions.

II. Persons Who Allege that They Have Been *Incorrectly* Regarded as Having a Handicap that Is Dangerously Communicable in the Workplace Should Not Be Precluded As a Matter of Law from Being "Otherwise Qualified" for the Job of Elementary School Teacher.

Petitioners' argument here, echoed by the United States, is that it has excluded and discriminated against Mrs. Arline not because of her handicap, but because of her communicability. Should the Court decide to address this intensely factual question — to the extent it can, at this stage of the record[7] — we urge it to simply affirm the framework established long ago by the federal regulations enforcing Section 504. Those regulations permit an employer to show that an employee has a condition that would endanger others as an element of job-relatedness, but would not permit, as a matter of law, an employer to simply assert without proof that any particular handicap is capable of communication in the workplace and hence to escape a claim of handicap discrimination. We set forth the regulatory framework and demonstrate that that approach is reasonably related to the purposes of Section 504, has been approved and codified by the Congress, and is completely consistent with and required by the decisions of this Court.

"Qualified handicapped person" is defined by the regulation to mean "[w]ith respect to employment, a

6. The Solicitor General also acknowledges that "[a]n individual who is disabled with an infectious, contagious disease surely may be a 'handicapped individual' within the meaning of the Rehabilitation Act." Brief for the United States As Amicus Curiae 12.

7. We agree with Justice Stevens' dissenting opinion on the granting of certiorari (J.A. 90-91) that certiorari was improvidently granted on the Court's added question.

handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." 45 C.F.R. §84.3(k)(1). The Department of Education construes this rule to place the burden squarely on the employer to demonstrate that any particular job function is "essential."[8] Although the Court's second certiorari question focuses upon the term "otherwise qualified," a unanimous Court recently noted that "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under the Section [504] would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped." *Alexander v. Choate*, 105 S.Ct. 712, 720 n.19 (1985). With this admonition in mind, we turn to the regulation's discussion of prohibited employment activities.

A. The Use of Employment Criteria Having a Discriminatory Effect Constitutes a Violation of Section 504 Unless Such Criteria Are Shown by the Employer to Be Job-Related.

Petitioners' "noncommunicability" employment criterion at first blush appears to be eminently reasonable, even responsible. The question of "discrimination" arises only if that criterion is improperly utilized to exclude handicapped persons with such conditions as hepatitis or AIDS that can only be communicated via activities

8. Office for Civil Rights, U. S. Department of Education, OCR Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973, at 120 (1981) [*hereafter cited as* Department of Education Handbook] (amici are contemporaneously depositing nine copies of the Department of Education Handbook with the Clerk of the Court and are providing it to the parties). The Department of Education Handbook was officially "Reviewed and Approved for Use by the Department of Education" and "constitutes the legal framework for Section 504" utilized by that agency. *Id.* cover page, 3.

that normally do not occur in the workplace (*e.g.*, through blood transfusions or sexual intercourse), or such conditions as the forms of tuberculosis that are rendered noncommunicable through a medication regimen. The Secretary's construction[9] of Section 504 requires

9. "[T]hese [1977] regulations [are] an important source of guidance on the meaning of §504," *Alexander v. Choate*, 105 S.Ct. at 722 n. 24. Unlike the §504 rule at issue in *Bowen v. American Hosp. Ass'n*, 106 S.Ct. 2101, 2122 (1986), they constitute the longstanding, contemporaneous and consistent construction of the Secretary, and were unquestionably intended by the Congress, *see* S. Rep. No. 1297, 93d Cong., 2d Sess. 39-40 (1974), which directed that the Secretary of HEW assume the lead role in implementing Section 504 and acknowledged that agency's expertise and "experience in dealing with handicapped persons and with the elimination of discrimination in other areas," *id.* 40; *see also Rehabilitation Act Amendments of 1974*, Hearings Before the Subcomm. on the Handicapped of the Comm. on Labor & Pub. Welfare, U. S. Senate, 93d Cong., 2d Sess. 224 (1974); Brief for the United States 20 & n.10, *University of Tex. v. Camenisch* (No. 80-317) (criticizing as factually inaccurate the Court's assertion in *Southeastern Community College v. Davis*, 442 U.S. 397, 412 n.11 (1979), that the Secretary had altered his position that rules to enforce §504 were required).

Moreover, when the Congress substantially amended the Rehabilitation Act in 1978, it not only acquiesced in the Secretary's construction, *compare Bob Jones Univ. v. United States*, 461 U.S. 574, 599-602 (1983), but expressly "intended to codify the regulations of the Department of HEW governing enforcement of 504," *Conrail v. Darrone*, 104 S.Ct. at 1255 & n.15 (citing 29 U.S.C. §794a(a)(2) and S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978)); *accord, Alexander v. Choate*, 105 S.Ct. at 722 n.24. Aside from §794a(a)(2), several other provisions of the 1978 amendments substantiate Congress' approval of the Secretary's 1977 construction. 29 U.S.C. §794c (establishing an interagency council to insure uniform "implementation and enforcement" of §504, including "the regulations prescribed thereunder"); *id.* §706(7)) (excluding for the purposes of employment those whose "current use of alcohol or drugs prevents such individual from performing the duties of the job in question or . . . would constitute a direct threat to property or the safety of others," in order to alleviate the concern of some members

nothing more — and nothing less — than the proper application of proper employment criteria. Thus, petitioners' practice unquestionably fits within the regulation's provision regarding "criteria . . . that have the effect" of excluding handicapped persons or subjecting them to discrimination. 45 C.F.R. 84.4(b)(4)(i). As the employment subpart of the rule specifies, employers "may not make use of any . . . selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: the . . . selection criterion, as used by the [employer], is shown to be job-related for the position in question." *Id.* §84.13(a)(1). According to the Secretary's Section-by-Section Analysis of the rule,[10] this provision simply

of Congress about the scope of the 1977 HEW employment regulation); *id.* §792(d)(3)(authorizing the Architectural and Transportation Barriers Compliance Board to "provide appropriate technical assistance to any . . . entity, affected by regulations" under §504); *id.* 794(b)(3) (authorizing "financial assistance . . . for the purpose of removing architectural, transportation, and communication barriers" to aid compliance with the 1977 HEW regulation); *id.* §794a(b) (authorizing attorneys' fees awards for prevailing handicapped plaintiffs, to encourage private suits to enforce the 1977 HEW regulation, the provision's sponsor stated, 123 Cong. Rec. 27821 (1977) (Rep. Koch)).

Where as here "[t]he responsible congressional committees participated in their formulation, and both these committees and Congress itself endorsed the[se] regulations in their final form," *Conrail*, 104 S.Ct. at 1255, these "regulations particularly merit deference in the present case," *ibid.*, and a court "does not simply impose its construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

10. The "analysis of the regulation . . . describes the basis and purpose of each section." 42 Fed. Reg. 22677 (1977). Such an analysis, issued by the Secretary who promulgated the regulations and was charged with administration of the statutes, is entitled to substantial deference. *Bowles v. Seminole Rock & Sand Co. v. Milholin*, 444 U.S. 555, 556 (1980). The Court relied upon the Secretary's Section-by-Section Analysis in *Southeastern Community College v. Davis*, 442 U.S. at 406-07 & n.7, and in *Alexander v. Choate*, 105

enforces "the principle established under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)." 42 Fed. Reg. 22688 (1977). Thus, the explicit intent of the Secretary was to apply the *Griggs* Title VII standard to Section 504 employment cases.[11]

In *Griggs* the Court acknowledged the fundamental principle that "Congress did not intend by Title VII to guarantee a job to every person regardless of qualifications." Rather, Chief Justice Burger wrote, "what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial *or other impermissible* classification." 401 U.S. at 430-31 (emphasis added).

Section 504, like Title VII, "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes" or handicapped persons "cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431. Under the *Griggs* standard, incorporated by the Secretary, "good intent or absence of

NOTES *(Continued)*

S.Ct. at 723 n.26; *see also Nelson v. Thornburgh*, 567 F.Supp. 369, 380 (E.D. Pa. 1983), aff'd, 732 F.2d 147 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 955 (1985).

11. The Secretary's application of this standard is especially appropriate in view of Section 504's heritage as part of the "general corpus of discrimination law," *New York St. Ass'n of Retarded Children v. Carey*, 612 F.2d 644, 649 (2d Cir. 1979), and this Court's acknowledgment of that heritage in *Alexander v. Choate*, 105 S.Ct. at 716-19 & nn.7, 11, 13. "We presume that this general framework was familiar to Congress when it enacted §504." *Bowen v. American Hosp. Ass'n*, 106 S.Ct. at 2113, citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979). *See also City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249, 3256-57 (1985).

discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432. *Accord, Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-23, 425 (1975). Thus, according to the Secretary's Section-by-Section Analysis, under *Griggs*, and under the regulation, "once it is shown that an employment test substantially limits the opportunities of handicapped persons, *the employer* must show the test to be job-related." 42 Fed. Reg. 22689 (1977)(emphasis added).

Moreover, Section 504 must be read in conjunction with the "broad aims" of the statute of which it is a part. *Albemarle Paper Co. v. Moody*, 422 U.S. at 417-25. The Congressional Declaration of Purpose for the Rehabilitation Act is to "implement . . . the guarantee of equal opportunity" for handicapped persons. 29 U.S.C. §701. As under Title VII, "[w]hen an employer uses a non-job-related barrier" to deny a handicapped person employment, "and that barrier has a significant adverse effect" on particular handicapped persons, then the excluded employee "has been deprived of an employment *opportunity*" because of her handicap. *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (emphasis by the Court); *accord, Griggs v. Duke Power Co.*, 401 U.S. at 430, 431 (explicitly focusing on employment "practices, procedures, or tests" that deny equal employment "opportunity").

"Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet the 'burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.' " *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977), *quoting Griggs*, 401 U.S. at 432. Indeed, petitioners apparently concur at least in the assignment of the burden of proof. Pet. Brief 39 ("*the employer must demonstrate* that the articulated risk is real") (emphasis added).

Just as blacks have successfully challenged under Title VII the discriminatory effects of practices excluding — on the "neutral" basis of fear of health risks — persons with pseudofolliculitis barbae, even in the face of employers' claims that such risks are governed by state and municipal health codes, *see, e.g., Richardson v. Quick Trip Corp.*, 591 F.Supp. 1151, 1154-55 (S.D. Iowa, 1984); EEOC Dec. No. 83-17, 33 F.E.P. Cases 1884, 1886 & n. 6 (Sept. 2, 1983), so too must handicapped persons, under the regulation, be permitted to challenge practices like petitioners'. Otherwise, employers also would be permitted under Title VII to adopt blanket policies excluding Haitians or blacks based upon some "good faith" fear that the members of those national origin or racial groups are more likely to have acquired AIDS or other conditions that are irrationally feared[12] and that are not communicable by casual contact.

Enactment of Section 504 represents a judgment by the Congress about handicapped persons like that rendered about other minorities when it enacted Title VII that characteristics "resulting from forces beyond their control not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973).[13] Any different construction of Section 504 would permit an employer to refuse to hire handicapped workers for any number of "good faith," "neutral," but

12. It is long-settled law that unfounded fears cannot be a proper basis for exclusion. *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. at 3259-60; *id.* 3262 (Stevens, J., concurring); *id.* 3266-68 (Marshall, J., concurring); *Palmore v. Sidoti*, 104 S.Ct. 1879 (1984).

13. It is noteworthy that Section 504 "was enacted by Congress within a few months after the Court's decision in *McDonnell Douglas*." *New York St. Ass'n of Retarded Children v. Carey*, 612 F.2d at 649 n. 5.

not demonstrably job-related reasons, *e.g.*, to take one instance cited in Section 504's legislative history, that their very "physical appearance would have a 'nauseating effect' " on other workers. 117 Cong. Rec. 45974 (1971) (statement of Rep. Vanik).[14] But Section 504 "constitutes the establishment of a broad governmental policy that programs receiving federal financial assistance shall *be operated* without discrimination on the basis of handicap." S.Rep. No. 93-1297, 93d Cong., 2d Sess. 39 (1974) (emphasis added).[15]

Statutory prohibitions of employment discrimination like Section 504 and Title VII "involv[e] a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution." *Washington v. Davis*, 426 U.S. 229, 247 (1976). "Requiring governmental agencies to rebut in court a *prima facie* case of discrimination against the handicapped does not mean that the expertise of responsible administrators is to be denigrated." But such administrators must "demonstrate that the health hazard posed by [communicability] was anything more than a remote possibility." *New York*

14. Congressman Vanik's discussion arose in the context of his criticism of a state court decision upholding the exclusion of a cerebral palsied child from public school despite his being "academically competent" and nonthreatening to other students, since the teacher felt the handicapped student's "physical appearance would have a 'nauseating effect' on his classmates." 117 Cong. Rec. 45974 (1971). It was such practices, Congressman Vanik said, that Section 504 was meant to rectify. *Id.* The legislative history of Section 504 bearing upon this issue is more fully set forth in the Brief of Senator Alan Cranston, *et al.*, as Amici Curiae.

15. This Court consistently has relied upon S. Rep. No. 93-1297 as an authoritative exposition of the Congressional intent under Section 504. *See Alexander v. Choate*, 105 S.Ct. at 717 n.7, 723 n.24, 724 nn.27, 30; *Community Television v. Gottfried*, 459 U.S. 498, 509 (1983); *Conrail v. Darrone*, 104 S.Ct. 1248, 1225 n.15 (1984).

State Ass'n for Retarded Children v. Carey, 612 F.2d at 650.[16]

The Solicitor General asserts that a policy like petitioners' cannot be discriminatory so long as it is not a "pretext" for intentional discrimination. Brief for the United States As Amicus Curiae 11, *citing Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This ignores the well-settled framework of the cases requiring employers in discriminatory impact cases to show that the rationale for practices having a discriminatory effect is, demonstrably, job-related. Only *if* — and *after* — the employer successfully fulfills that burden is the employee to be given a final opportunity in rebuttal to establish pretext. *E.g., Connecticut v. Teal*, 457 U.S. 440, 447 (1982). As the *Burdine* Court itself recognized, "the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." 450 U.S. at 253 n. 5. "In a disparate impact case, unlike a disparate treatment case, a rational or legitimate, nondiscriminatory reason is insufficient. The practice must be essential, the purpose compelling." *Williams v. Colorado Springs School District*, 641 F.2d 835, 842 (10th Cir. 1981); *accord*, *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 752-53 & n.2 (5th Cir. 1981) (Vance, *J.*).

The Solicitor General simplistically rejects the entire disparate impact concept as going beyond the "boundless notion that all disparate-impact showings constitute prima facie cases under §504." Brief for the United States As Amicus Curiae 21-22 n.19, *quoting Alexander v. Choate*, 105 S.Ct. at 720. However, in *Choate*, the

16. As the Solicitor General acknowledges, Brief for United States as Amicus Curiae 22 n. 20, *citing New York St. Ass'n for Retarded Children v. Carey*, 612 F.2d at 649, regardless of how the Court decides this case, it would violate §504 to apply an exclusionary policy based on communicability to retarded persons but not to others.

unanimous Court indicated with particularity precisely and solely which actions it deemed out of Section 504's bounds: Those modifications in the nature of an employer's program so "fundamental" or "substantial" as to vitiate "the integrity of their programs." *Choate*, 105 S.Ct. at 720. Contrary to the United States' unfair characterization of *Choate*, that Court acknowledged that the Congress enacted Section 504 against the background of "nearly a decade of experience [that] had been accumulated with the operation of the nondiscrimination provisions of Titles VI and VII," and that "Congress was well aware of the intent/impact issue and of the fact that similar language in Title VI consistently had been interpreted to reach disparate impact discrimination." *Choate*, 105 S.Ct. at 718 n.11. As Justice White wrote in *Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 592 (1983), the language of Title VI — tracked verbatim in Section 504— "is surely subject to the construction given the anti-discrimination proscription of Title VII in *Griggs* . . . at least to the extent of permitting, if not requiring, regulations that reach disparate impact discrimination."

Moreover, as *Choate* explicitly recognized, the legislative history of Section 504 "listed, among the instances of discrimination that the section [504] would prohibit, the use of . . . the discriminatory effect of job qualification . . . procedures." *Choate*, 105 S.Ct. at 719, *quoting* 118 Cong. Rec. 525-26 (1972) (statement of §504's co-sponsor, Sen. Humphrey, whose remarks are "a primary signpost on the road toward interpreting the legislative history of §504," *Choate*, 105 S.Ct. at 718 n.13).

No one in this case suggests that employers are prohibited from protecting third parties from communicable conditions, only that such stark — but sometimes necessary — employment barriers as that adopted by petitioners here may not be utilized "without meaningful study of [their] relationship to job-performance ability,"

Griggs, 401 U.S. at 431, and that the burden be placed squarely on the employer to show that its policy is "demonstrably a reasonable measure of job performance," *id.* at 436.

B. A Bona Fide Occupational Qualification Defense Is Not Permissible Here Since Case-by-Case Determinations Are Required to Determine Whether Any Individual with Tuberculosis May Justifiably be Excluded from Employment for Health or Safety Reasons.

Section 504 requires, as its centerpiece, that an employer make a case-by-case determination of qualifications for each handicapped person before deciding whether that individual is a "qualified handicapped person." *E.g., Strathie v. Department of Transportation*, 716 F.2d 227, 231-34 & n.7 (3d Cir. 1983). Like Title VII, Section 504's "focus on the individual is unambiguous." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978).

However, the Court-proposed second question appears to request briefing of the question whether there might be circumstances in which individual determinations are *not* required, *i.e.*, whether an entire class of handicapped persons may, in the Court's words (J.A. 90), be "precluded from being 'otherwise qualified' " for a given occupation by virtue of the mere existence of a handicap. This general concept is of course well-known in the areas of age and gender employment discrimination as the "bona fide occupational qualification" (BFOQ) defense. We concur with the American Medical Association (AMA) that the Court ought to proceed with the utmost caution (Brief of the AMA as Amicus Curiae 10) before excluding any entire category of handicapped persons from the coverage of Section 504. As the Connecticut Supreme Court has ruled, "Blanket exclusions,

no matter how well motivated, fly in the face of the command to individuate that is central to fair employment practices." *Connecticut Institute for the Blind v. Connecticut Commission on Human Rights*, 176 Conn. 88, 405 A.2d 618, 621 (1978).

The Secretary, in his Section-by-Section Analysis of the regulation, touched upon this issue in his discussion of the meaning of the phrase "otherwise qualified," explaining that Section 504 would not prohibit, for example, a bus company from adopting a rule barring all blind persons from applying for jobs as bus drivers. 42 Fed. Reg. 22686, ¶5 (1977). By recognizing the legitimacy of such a practice, the Secretary may have meant to suggest the possible existence in certain circumstances of a defense akin to a BFOQ. But the Department of Education has indicated that to the extent any such defense may be cognizable under Section 504, it must be "a limited one." Department of Education Handbook, *supra* note 8, at 150. Thus, while "[t]he language 'otherwise qualified' implies that differentiating on the basis of handicap is not per se violative of Section 504 if the handicap goes to the essence of the job," such a blanket defense "would have to be narrowly construed in order to be consistent with the statute" and would apply *"only to those situations in which the employer could demonstrate that the BFOQ would not preclude any handicapped individual from employment who could 'otherwise qualify'* (i.e., who, with reasonable accommodation could perform the essential functions of the job) *if individually tested."* *Id.* at 150-51 (emphasis added by the Department of Education).

Even under the Civil Rights Act of 1964 and under the Age Discrimination in Employment Act of 1967, both of which, unlike Section 504, expressly codified a BFOQ

defense,[17] such a blanket exclusion "was in fact meant to be an extremely narrow exception to the general prohibition" of discrimination. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). The exception is extremely narrow even where safety is of critical importance — that was this Court's holding in *Western Airlines v. Criswell*, 105 S.Ct. 2743 (1985). Requiring individualized determinations would "not ignore the public interest in safety" since, as the Court noted (*id.* 2754):

> "When an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' to safe operation of the business. The uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to err on the side of caution in a close case."

Moreover, the Court noted that "[s]uch considerations of course are only relevant at the margin of a close case, and do not relieve *the employer* from *its* burden of establishing the BFOQ by the preponderance of credible evidence." *Id.* at 2754 n.29 (emphasis added). But, the Court observed, there is a built-in protection in safety cases, for "[w]hen the employer's argument has a credible basis in the record, it is difficult to believe" that the finder of fact "would not defer in a close case to the [employer's] judgment." *Id.* at 2754.

Congress intended from the beginning that the requirement of job-relatedness would satisfy all of the same concerns raised by the BFOQ defense. As this

17. *See* 42 U.S.C. §2000e-2(e)(1); 29 U.S.C. §623(f)(1); *cf. Conrail v. Darrone*, 104 S.Ct. at 1253 (statutory exclusions under the Civil Rights Act of 1964 inapplicable where "§504 itself contains no such limitation").

Court observed in *Alexander v. Choate*, 105 S.Ct. at 718 n.13, Section 504 had its origins in companion bills introduced by Representative Vanik and Senators Humphrey and Percy. H.R. 12154, 92d Cong., 1st Sess., 117 Cong. Rec. 45945 (1971); S. 3044, 92d Cong., 2d Sess., 118 Cong. Rec. 525-526 (1972). Those bills would have amended Title VI to bar discrimination against a person on the basis of a handicap "unless lack of such physical or mental handicap is a bona fide qualification reasonably necessary to the normal operation of such program or activity." 118 Cong. Rec. 526 (1972); *see also id.* at 2999 (statement of Rep. Vanik). Section 504 embodies the intent of this predecessor bill. *Alexander v. Choate*, 105 S.Ct. at 718 n.15; *see* 119 Cong. Rec. 6145 (1973) (statement of Sen. Humphrey); *id.* at 7114 (remarks of Rep. Vanik). Discussing this historical origin of Section 504 in a recent brief before this Court, the Solicitor General, representing the Secretary of HHS, agreed that "[t]he phrase 'otherwise qualified' in Section 504 therefore should be understood to refer to a qualification reasonably necessary to the operation of the federally assisted program." Brief for the Petitioner 22 n.10, *Bowen v. American Hospital Ass'n*, No. 84-1259; *see also* 124 Cong. Rec. 30322-30325 (1978)(debate on 1978 amendment to 29 U.S.C. 706(7)); 124 Cong. Rec. 37509-37510 (remarks of Sen. Williams); *see generally supra* notes 11, 14.

Application of this well-settled law to this case indicates that a blanket rule permitting the exclusion of all persons with a record of tuberculosis should not be sanctioned. As the AMA indicates, tuberculosis *varies considerably* from individual to individual in terms of its symptoms, its susceptibility to treatment, and its transmissibility. Brief of the AMA as Amicus Curiae 5-7. Thus, as Florida state laws recognize, "*individualized* decisions should be made about the risk posed to others by a person with tuberculosis." *Id.* 7 (emphasis added). State health and safety codes "do not establish blanket

rules concerning the appropriate response to communicable diseases." *Id.* Section 504 demands that the standards established by such codes, and the sound, fact-based judgments of professionals enforcing those codes, be respected. We concur with the AMA that since "[t]he district court . . . made no specific findings about respondent's medical history or condition (*id.* 8), the Court "should refrain from issuing a blanket rule about whether persons suffering from infectious tuberculosis are 'otherwise qualified' to serve as elementary school teachers" (*id.* 11). *Accord*, Brief of the American Public Health Ass'n, *et al.*, as Amici Curiae. Especially in view of the stigma, and the prejudice, and the cruel myths historically perpetrated about persons with tuberculosis,[18] Section 504 demands that the utmost care be taken

18. Susan Sontag in her *Illness as Metaphor* (1978), has collected the literature on tuberculosis, a condition that historically "was thought to be an insidious, implacable theft of a life." Sontag writes that "[c]ontact with someone afflicted with a disease regarded as a mysterious malevolency inevitably feels like a trespass; worse, like the violation of a taboo. The very names of such diseases are felt to have a magic power. In Stendhal's *Armand* (1827), the hero's mother refuses to say 'tuberculosis,' for fear that pronouncing the word will hasten the course of her son's malady." The solution, Sontag wisely states, is "to rectify the conception of the disease, to demythicize it." Otherwise, "[t]he metaphors attached to TB . . . imply living processes of a particularly resonant and horrid kind."

"TB was — still is — thought to produce spells of euphoria, increased appetite, exacerbated sexual desire." Conversely, "TB is often imagined as a disease of poverty and deprivation — of thin garments, thin bodies, unheated rooms, poor hygiene, inadequate food. The poverty may not be as literal as Mimi's garret in *La Boheme*; the tubercular Marguerite Gautier in *La Dame Aux Camelias* lives in luxury, but inside she is a waif." Indeed, "[n]ineteenth-century literature is stocked with descriptions of almost symptomless, unfrightened, beatific deaths from TB, particularly of young people, such as Little Eva in *Uncle Tom's Cabin*. . . ."

Moreover, "people could believe that TB was inherited . . . and also believe that it revealed something singular about the person afflicted." As Kafka wrote to Felice, "Secretly I don't believe this illness to be tuberculosis . . . but rather a sign of my general bankruptcy." Indeed, tuberculosis has been used as a metaphor for all that is "unqualifiedly and unredeemably wicked. It enormously ups the ante. Hitler, in his first political tract, an anti-Semitic diatribe written in September 1919, accused the Jews of producing 'a racial tuberculosis among nations.' " S. SONTAG, *supra* at 5, 6, 7, 9, 13, 15, 16, 19, 38, 44, 61, 62, 83.

to "ensur[e] that employment decisions about handicapped [persons] are not made as a result of fear, stereotypes or prejudice . . . [by] requir[ing] that recipients make reasonable employment decisions based on reasonable, individualized medical judgments about the nature, degree, and duration of the handicap, if any, caused by the disease and the nature, degree and duration of risk to third parties." Brief of the AMA as Amici Curiae 9.

III. The Doctrine of Reasonable Accommodation Encompasses Modifications in an Employer's Program Such as Job Reassignment that Do Not So Fundamentally Alter the Nature of the Program as to Compromise its Essential Nature.

The Solicitor General erroneously argues that petitioners are not required to offer respondent any different position. Brief for the United States as Amicus Curiae 26-27. Here the "job in question," within the meaning of 45 C.F.R. §84.3(h), is that of being an educator. Indeed, her employment with petitioners did not even require her to teach any particular grade, *id.* 55-56, and there may well be numerous additional positions available at the school board for which Mrs. Arline was qualified that may not even require any substantial contact with students, such as curriculum development or administration, *id.* 59-61. The only remaining question, then, under *Alexander v. Choate*, is whether reassigning Mrs. Arline would amount to such a "fundamental alteration in the nature of [petitioners'] program" that it would "compromis[e] the essential nature" of that program. 105 S.Ct. at

720. The record reveals that it would not since petitioners as a matter of course employed teachers in grades outside their fields of certification, J.A. 56. Petitioners could permissibly have conditioned an offer to teach other students or even adults upon Mrs. Arline's becoming recertified, but they never did so, *see* J.A. 56-57, nor did petitioners even cursorily consider Mrs. Arline for any education positions with diminished opportunities for student contact, *id.* 61.

In an opinion letter dated August 5, 1986, the U. S. Department of HHS ruled that under its Section 504 regulation, the same regulation that governs here, a hospital could be required to accommodate handicapped employees by "transfer to another appropriate position where such transfers are feasible." Office for Civil Rights, HHS, Complaint No. 04-843096, Opinion Letter of August 5, 1986, at 8 (amici are depositing nine copies of this Opinion Letter with the Clerk of the Court and are providing it to the parties). Such an administrative construction by an agency of its own regulation is entitled to conclusive weight so long as it is neither "plainly erroneous" nor "demonstrably irrational." *See, e.g., Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-66 (1980); *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 276 (1969).

While *Choate* makes clear that there are limits to the accommodation requirement, *e.g.*, petitioners of course would not be required to create a wholly new position just so that Mrs. Arline might remain employed there, *Choate* makes equally clear that enforcement agencies and courts of equity are to be provided "substantial leeway" in fashioning sensible accommodations. 105 S.Ct. at 723 n.24.[19] For this Court to now rule that *any*

19. Such leeway also fits the broad "remedial purpose of the Rehabilitation Act 'to promote and expand employment opportunities' for the handicapped." *Conrail v. Darrone*, 104 S.Ct. at 1255. "Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds." *Id.* 1254 n.13. But, as in *Conrail*, "this decision to limit §504 to the recipients of federal aid does not require us to limit that section still further, as petitioner urges." *Id. See also Lau v. Nichols*, 414 U.S. 563, 567 (1974)(requiring under Title VI that students handicapped by "linguistic deficiencies" be accommodated by transferring them to classes taught in their own language).

job reassignment is precluded as a matter of law under Section 504 might take away what in a given case may prove to be the simplest, least expensive, and most effective vehicle for accommodating handicapped employees, thereby permitting them "meaningful access," *Choate*, 105 S.Ct. 721 & n.21, to professional endeavors, as contemplated by the Rehabilitation Act.[20]

20. *Choate* acknowledged that the very regulation applicable here, 45 C.F.R. §84.12(a), "requiring an employer to make 'reasonable accommodations to the known physical or mental limitations' of a handicapped individual" is "consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." 105 S.Ct. at 721 n.21.

Whether Mrs. Arline is entitled to any relief is not a question involved in this review. As in *Albemarle Paper Co. v. Moody*, 422 U.S. at 413, a remand is appropriate since the equities of Mrs. Arline's case were never reached by either of the courts below.

CONCLUSION

For the foregoing reasons, the holding of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1985

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, et al.,

Petitioners,

vs.

GENE H. ARLINE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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BRIEF OF DOCTORS FOR AIDS RESEARCH AND EDUCATION, AS AMICI CURIAE

INTEREST OF AMICI CURIAE

This brief amici curiae is submitted in support of Respondent, on behalf of Doctors for AIDS Research and Education (DARE). DARE is composed of physicians and public health specialists who are experts on the disease commonly known as Acquired Immune Deficiency Syndrome (AIDS).[1]

Through this brief, Amici provide the Court with accurate and up-to-date medical facts regarding AIDS in order to correct the misinformation and distortions proffered by briefs previously filed herein by others. These facts become crucial only if the Court chooses to consider an issue not before it, the

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1 The qualifications of the individuals who constitute DARE are set forth in the Appendix to this brief.

applicability of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, et seq., (the "Act") to individuals infected with the AIDS virus.

Resolution of that question should await a case squarely presenting the issue, to allow development of a full record, missing here. Nevertheless, even basic available medical data demonstrate that individuals infected with the AIDS virus must be encompassed within the framework of the Act. Amici, as experts, here present these data.[2]

SUMMARY OF ARGUMENT

The scope of review in the present case is narrow. The questions this

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2 The parties to this action have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of this Court.

Court certified for consideration are expressly limited to the "disease of tuberculosis." School Board of Nassau County, Florida v. Arline, 106 S. Ct. 1633, 1634 (1986). No testimony, other evidence or findings below dealt with, or even mentioned, AIDS. The Act's focus upon individualized consideration of the handicapped thus prohibits transforming this case about a woman with tuberculosis into a vehicle for speculation on the varied situations of the over one million Americans who have been afflicted with a virus causing the very different disease of AIDS.

Nevertheless, without adequate information and in the absence of a record, Petitioners would have the Court, through a broadly based decision, pre-judge issues bearing upon those infected with the AIDS virus.[3] Amici

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3 Petitioners and those supporting their petition have tried repeatedly to

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urge the Court to reject efforts to broaden the scope of the issues presented and to limit its ruling to the record before it.

The high mortality rates resulting from AIDS have created anxiety in a public uninformed about the disease,[4] an anxiety that many of Petitioners' amici attempt to feed.[5] This hysteria and the public's misguided exclusive association of the infection with certain sexual activities have brought political

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interject questions about AIDS into this case. Petitioners' Reply Brief on Writ of Certiorari discussed application of the Act to AIDS exclusively. Petitioners' Opening Brief discusses at length the Justice Department's Office of Legal Counsel's Memorandum Re: Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex or AIDS Virus (June 23, 1986) [hereinafter DoJ Memo], a copy of which Petitioners have lodged with the Court. All amici supporting Petitioners refer to the DoJ Memo in their briefs, and the brief amicus curiae of Congressman Dannemeyer, et al. speaks more about AIDS than about tuberculosis.

4 A September 1985 CBS poll found that 47% erroneously think it is possible to contract AIDS from a shared drinking glass, 32% believe in error that AIDS may be contracted from kissing, and 28% mistakenly think AIDS can be contracted from a toilet seat. Lieberson, The Reality of AIDS, N.Y. Rev. 43, 45 (Jan. 16, 1986) [hereinafter Reality]. Such misperceptions have resulted in television crews walking off the set where persons with AIDS were being interviewed, TV Crew Leaves Set of AIDS Victims Interview, N.Y. Times, Mar. 28, 1985, at B6, col. 3, and students being removed from classes because of suspicions that boyfriends of their mothers had contracted AIDS. AIDS Fear Forced Pupils Out, N.Y. Times, Oct. 4, 1985, at B1, col. 4; see also Korcok, AIDS Hysteria: A Contagious Side Effect, 133 Can. Med. A.J. 1241 (Dec. 1985).

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5 See, e.g., Brief Amicus Curiae of Cong. Dannemeyer, et al., at 18-19, n. 7. Not even the legal system has been immune from such irrational reactions. See, e.g., Richmond News Leader, Sept. 6, 1985, at 13, col. 1 (reporting dropping of charges against criminal defendant with AIDS rather than having accused enter courtroom).

tensions into the medical arena.[6] Amici seek to help resolve these tensions by providing an accurate understanding of the nature of AIDS.

Amici first describe the nature of the AIDS virus, based on articles in authoritative medical journals. The studies reported demonstrate that the AIDS virus is difficult to contract.[7] Hence, the Centers for Disease Control ("CDC")[8] recommends that individuals who have been infected with the virus be permitted to continue to work and attend school.[9]

Second, Amici demonstrate that persons infected with the AIDS virus are handicapped individuals under the Act's provisions. Those infected have physical and mental impairments that substantially limit major life activities. They also are regarded by others as having such impairments.

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6 See Medical Experts Assail Initiative on AIDS: Officials Dismiss Claims Made by Supporters of LaRouche-Backed Prop. 64, L.A. Times, Aug. 3, 1986, § 1, at 3, col. 2; Eu v. Male, No. 341940, slip op. (Sac., Cal. Sup. Ct. Aug. 8, 1986) (ordering removal of "medical data" -- erroneously asserting that casual transmission of AIDS virus has been shown to occur -- from argument in favor of quarantine initiative in state ballot pamphlet).

7 See, e.g., Sande, The Case against Casual Contagion, 314 New Eng. J. Med. 380 (Feb. 1986) [hereinafter Casual].

8 The CDC is the federal agency charged with protecting the nation's public health by providing leadership and direction in the prevention and control of disease. The United States Government Manual 1985-86 276 (1985).

9 Recommendations for Preventing Transmission of Infections with Human T-Lymphotropic Virus Type III/ Lymphadenopathy-Associated Virus In The Workplace, 34 Morbidity and Mortality Weekly Report [hereinafter "MMWR"] 681 (Nov. 1985) [hereinafter Workplace]; Education and Foster Care of Children Infected With Human T-Lymphotropic Virus Type III/ Lymphadenopathy-Associated Virus, 34 MMWR 517 (Aug. 1985) [hereinafter Education].

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The Act does not exclude conditions like AIDS. Instead, it requires that each person infected with the AIDS virus be permitted to participate in all federally funded programs, unless and until individualized symptoms of the disease render that person unqualified to perform the activity in which he or she is engaged.

ARGUMENT

I. A REVIEW OF THE MEDICAL AUTHORITIES DEMONSTRATES THAT PERSONS INFECTED WITH THE AIDS VIRUS ARE HANDICAPPED INDIVIDUALS.

Those infected with the AIDS virus are the subject of public ignorance and unfounded fears, just like other handicapped persons whom Congress sought to protect in passing the Act. Absent legal protection, they are subjected to irrational discrimination and exclusions on the basis of their impairments, at a

cost both to themselves and society. Understanding what AIDS is shows that there is no reason to treat persons exposed to the AIDS virus any differently from those with other handicaps.[10]

A. What Is AIDS?

Acquired Immune Deficiency Syndrome (AIDS) is the clinical manifestation of a dysfunction of the human immune system caused by a recently discovered virus.[11]

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10 While Amici have felt it important to present the medical facts set forth in this brief, the record in the present case is insufficient to support a decision reaching AIDS issues. Cf. Commonwealth of Massachusetts v. Painten, 390 U.S. 560, 561 (1968) (dismissing writ because record not sufficiently clear and specific to permit decision of issues).

11 Gallo, et al., Frequent Detection and Isolation of Cytopathic Retroviruses (HTLV-III) from Patients With AIDS and At Risk For AIDS, 224 Sci. 500 (May 1984). The AIDS virus has received several names: Human T-Lymphotropic Virus Type III (HTLV-III); Lymphadenopathy-

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The human immune system works through a complicated process by which certain white blood cells are able to recognize and destroy foreign agents that enter the body. The AIDS virus kills the immune system's T-helper cells -- the primary warriors of the cell-mediated immune system[12] -- leaving those infected with the virus vulnerable to diseases

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Associated Virus (LAV); AIDS-Associated Retrovirus (ARV); and, most recently, Human Immunodeficiency Virus (HIV). Compare Langone, AIDS, 6 Discovery 28, 30 (Dec. 1985) [hereinafter AIDS] and DoJ Memo, supra note 3 (both using former terminology) with Coffin, et al., Human Immunodeficiency Viruses (Letter), 232 Sci. 697 (May 1986) (proposing HIV terminology). This brief refers to the virus as simply the "AIDS virus." Those whose blood indicates they have been exposed to the virus are termed "seropositive."

12 A. Fettner & W. Check, The Truth About AIDS 44 (1984); Jaret, The Wars Within, 169 Nat'l Geographic 702, 723 (June 1986) (photographic essay on immune system and AIDS virus).

(called "opportunistic" infections) that do not affect healthy people.[13]

To date, there is no vaccine against nor cure for AIDS. Education is crucial in bringing about changes in behavior, the only known means of prevention.[14]

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13 As of July 29, 1986, the total reported number of persons with AIDS in the U.S. has exceeded 23,000, over half of whom have died. CDC, Weekly Surveillance Report - United States AIDS Program, July 29, 1986 [hereinafter CDC 7/29/86 Rep.].

14 U.S. Off. Tech. Assessment, Review of the Public Health Service's Response to AIDS: A Technical Memorandum 49 (Feb. 1985); see also Public Health Service Plan for the Prevention and Control of the AIDS Virus: Report of the Coolfant Conference, June 4-6, 1986, at 11-12 [hereinafter Coolfont Rep.], reprinted in principal part in 101 Pub. Health Rep. 341 (July-Aug. 1986); Self-Reported Behavioral Changes Among Homosexual Men -- San Francisco, 34 MMWR 613 (Oct. 1985) [hereinafter Behavioral Changes] (demonstrating that, as a result of education, the percentage of homosexual and bisexual men engaging only in non-promiscuous safe-sex practices rose from 61% in April 1984 to 81% one year later).

While fully developed AIDS is the best known condition associated with the AIDS virus, a range of symptoms may result from infection.[15] Recently, manifestations of the infection have been classified pursuant to four groups of symptoms and several sub-classes:[16]

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15 See Revision of the Case Definition of Acquired Immunodeficiency Syndrome for National Reporting -- United States, 34 MMWR 373, 374 (June 1985) [hereinafter Revision of Definition]; see also "The Case Definition of AIDS Used by CDC for National Reporting" (Aug. 1, 1985), Attachment A to DoJ Memo [hereinafter CDC Definition].

16 Previously, persons with the AIDS virus were classed as (1) having either AIDS; (2) having AIDS-Related Complex ("ARC"), which loosely referred to the conjunction of such symptoms as swollen lymph-nodes, fever, weight loss, fatigue, and night sweats, Kalish & Schlossman, The T4 Lymphocyte in AIDS, 313 New Eng. J. Med. 112 (July 1985), or (3) being asymptomatic but testing positive. See Reality, supra note 4. See also DoJ Memo, supra note 3, at 9 and n.20 (using former classification system).

(I) early acute, though transient, signs of the disease; (II) asymptomatic infection; (III) persistent swollen lymph-nodes; and (IV) presence of opportunistic disease and/or rare types of cancer, including one known as Kaposi's Sarcoma.[17]

Individuals in all four of the CDC classifications suffer from impairments to their physical systems. For example, even those who are asymptomatic have abnormalities in their hemic and reproductive systems making procreation and childbirth dangerous to themselves and others.[18]

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17 CDC, Classification System for Human T-Lymphotropic Virus Type III/ Lymphadenopathy-Associated Virus Infection, 105 Annals Internal Med. 234 (Aug. 1986) [hereinafter Classification].

18 Scott, et al., Mothers of Infants with the Acquired Immunodeficiency

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Symptoms classified under Class IV most severely impair the body's systems.[19] Such patients generally have

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Syndrome Evidence for Both Symptomatic and Asymptomatic Carriers, 253 J. A.M.A. 363 (June 1985) [hereinafter Mothers] (indicating 30-50% of children born to seropositive mothers develop AIDS and that seropositive women who become pregnant are at increased risk of developing Class IV AIDS themselves). As a result, the hemophiliac community has recommended that those who are seropositive give "serious consideration . . . to deferring pregnancy." Hemophilia Info. Exchange, AIDS, HTLV-III and Hemophilia: Your Questions Answered, AIDS Update 4 (Apr. 1986); see also Provisional Public Health Service Inter-Agency Recommendations for Screening Donated Blood and Plasma for Antibody to the Virus Causing Acquired Immunodeficiency Syndrome, 34 MMWR 1 (Jan. 1985) (advising persons with any evidence of AIDS virus infection to avoid transmission through sexual intercourse and to refrain from donating sperm, blood, etc.).

19 Class IV includes four subclasses: 1) constitutional diseases; 2) neurologic diseases; 3) secondary infections diseases [including infections of pathogens such as protozoa (amoeba-like organisms) or helminthics (worms); the

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multiple symptoms. While the lymphatic and hemic systems are the bodily systems most commonly affected,[20] attack upon the respiratory system causes the greatest number of deaths. Pneumocystis carinii pneumonia (PCP) is present in 58% of all AIDS patients. This uncommon form of pneumonia and a spectrum of other respiratory infections frequently bring about shortness of breath and severe chest pains.[21]

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most common are pneumocytis carinii pneumonia, diseases caused by fungi (molds such as candidiasis or cryptococcus), viral infections (like cytomegalovirus and herpes simplex) and bacterial infections (such as mycobacterium)]; and 4) other clinical symptoms not classifiable in other categories. See Classification, supra note 17; see also Revision of Definition, supra note 15.

20 Brettman, Serologic and Epidemiologic Assessment of AIDS Risk, 3 Infections in Med. 18, 20 (Jan. 1986) [hereinafter Serologic Assessment].

21 PCP is the most prevalent opportunistic disease affecting those with AIDS.

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Neurological disorders, including dementia, AIDS-virus induced encephalitis, and motor and behavioral changes are also common.[22] In addition, various bacteria and fungi attack the cardiovascular system, often resulting in congestive heart and renal failure.[23] Visual abnormalities, and even blindness, result from viral eye infections,[24] while the intestinal track is

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Although persons with adequately functioning immune systems are fully able to defend themselves against PCP, it has been fatal to 45% of those AIDS patients stricken with it. Daul, et al., Acquired Immnune Deficiency Syndrome: An Update and Interpretation, 51 Annals Allergy 351, 352-53 (Sept. 1983).

22 Navia, et al., The AIDS Dementia Complex: I. Clinical Features and II. Neuropathology, 19 Annals Neurology 517 & 525 (Apr. 1986).

23 Cohen et al., Congestive Cardiomyopathy in Association with the Acquired Immunodeficiency Syndrome, 315 New Eng. J. Med. 628 (Sept. 1986).

24 Friedman et al., Cytomegalovirus Retinitis: A Manifestation of the

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attacked through persistent month-long bouts of diarrhea.[25] In fact, it is fair to say that there is not a single system of the body that is not debilitated by the ubiquitous infections to which the body is susceptible after infection by the AIDS virus.

Clearly, these conditions drastically affect most major life activities. The cited studies illustrate that people with AIDS may have difficulty caring for themselves, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working, among other life functions.

Acquired Immune Deficiency Syndrome (AIDS), 67 Brit. J. Opthamology 372 (June 1983).

25 Serologic Assessment, supra note 20, at 20.

The most common way of determining whether someone has been exposed to the AIDS virus is to investigate whether antibodies to the virus (indicating previous infection) are present in the person's blood.[26] Although no one yet knows exactly how many of the persons testing positive for antibodies to the AIDS virus ultimately will develop cases of AIDS,[27] estimates run to between 20% and 30%.[28]

Between 1 and 1.5 million people in the United States are estimated to be seropositive at present.[29] The impact of AIDS on the economy will be enormous if all infected with the AIDS virus can be summarily excluded from the workforce while they are able to work.[30]

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26 See Blattner, et al., Epidemiology of Human T-Lymphotropic Virus Type III and the Risk of Acquired Immunodeficiency Syndrome, 103 Annals Internal Med. 665 (Nov. 1985). At present, a person's blood is determined to have antibodies to the AIDS virus after repeated trials with one test (the ELISA test), followed by a more specific confirmatory test (Western Blot). Id. (The confirmatory test is necessary because the ELISA test has a significant potential for error. Carlson, et al., AIDS Serology Testing in Low- and High-Risk Groups, 253 J. A.M.A. 3405 (June 1985).)

27 Norman, AIDS Trends: Projections From Limited Data, 230 Sci. 1018 (Nov. 1985) [hereinafter AIDS Trends].

28 Coolfont Rep., supra note 14, at 5, 7 (factors determining expression and progression of the disease in individuals largely unknown); see Update: Acquired Immunodeficiency Syndrome-United States, 35 MMWR 17 (Jan. 1986) [hereinafter Update]. One interesting study showed that four years after 9 newborns received transfusions of plasma from a single donor who, to his ignorance, had been infected with the virus, two had died from AIDS and three had ARC symptoms, but the other four were healthy. Lange, et al., HTLV-III/LAV Infection in Nine Children Infected by a Single Plasma Donor, 154 J. Infectious Diseases 171 (July 1986) [hereinafter Nine Children].

29 Coolfant Rep., supra note 14, at 4; Update, supra note 28.

30 Among those Americans thus far diagnosed with fully-developed AIDS, 40%

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The incubation period for onset of clinical AIDS is several years after infection, with an average of 4.5 years.[31] Individuals who ultimately will develop full AIDS are clearly employable during the prolonged incubation period.[32] Indeed, many persons who are infected with the virus may nonetheless live disease-free all their lives.[33] For example, of the

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are minorities (25% are Black and 14% are Hispanic). See CDC 7/29/86 Rep., supra note 13; Bakeman, et al., AIDS Risk-Group Profiles in Whites and Members of Minority Groups, 315 New Eng. J. Med. 191 (July 1986). All but 7% of those currently infected in the U.S. are male. Women and AIDS, Newsweek 60 (July 14, 1986).

31 Periods of up to 7 years have been reported thus far. Peterman, et al., Epidemiology of the Acquired Immunodeficiency Syndrome (AIDS), 7 Epidemiological Rev. 1 (1985); AIDS Trends, supra note 27, at 1018.

32 Workplace, supra note 9.

33 Health & and Pub. Policy Comm'n, Amer. C. Physicians, & the Infectious

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approximately 20,000 hemophiliacs in the United States (90% of whom are now seropositive), only about 100, or 2%, have fully developed AIDS.[34] This is particularly significant because most hemophiliacs were infected at the earliest stages of the epidemic as a result of direct injections of infected blood.[35] Thus, the data demonstrate

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Diseases Soc'y Amer., Position Paper: Acquired Immune Deficiency Syndrome, 104 Annuals Internal Med. 575 (Apr. 1986) [hereinafter Position Paper]; see also Mothers, note 18, supra.

34 Levine, The Acquired Immunodeficiency Syndrome In Persons With Hemophilia, 103 Annals Internal Med. 723 (Nov. 1985); see also Melbye, et al., Long-Term Seropositivity For Human T-Lymphotropic Virus Type III in Homosexual Men Without the Acquired Immunodeficiency Syndrome: Development of Immunologic and Clinical Abnormalities, 104 Annals Internal Med. 496 (Apr. 1986).

35 Evatt, Coincidental Appearance of HTLV-III/LAV Antibodies in Hemophiliacs and the Onset of the AIDS Epidemic, 31 New Eng. J. Med. 483 (Feb. 1985); AIDS, supra note 11, at 50.

that almost all individuals exposed to the virus are capable of many productive years in the workplace and that, throughout their work-lives, many will remain just as productive as their co-workers who have not been infected. This fact is recognized by the government's own CDC.[36]

B. The AIDS Virus Is Not Casually Transmitted.

The AIDS virus is not spread in the air by droplet infection as are the common cold, influenza or tuberculosis.[37] Fragile and killed by most household

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36 Workplace, supra note 9; see also Recommendations for Preventing Transmission of Infection with Human T-Lymphotrophic Virus Type III/ Lymphadenopathy-Associated Virus During Invasive Procedures, 35 MMWR 221 (Apr. 1986) (CDC explanation of how surgeons with AIDS can continue to perform their duties if they take limited specified precautions).

37 See Education, supra note 9.

disinfectants including, apparently, soap and water,[38] it is spread only via specific routes by transmission of infected blood, semen or vaginal fluids (and, possibly, mother's milk) from one person to another.[39] Transmission by either semen or blood accounts for virtually all reported cases.[40]

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38 Grouse, HTLV-III Transmission, 254 J. A.M.A. 2130 (Oct. 1985) [hereinafter Transmission]; see also Recommendations for Providing Dialysis Treatment to Patients Infected With Human T-Lymphotrophic Virus Type III/Lymphadenopathy-Associated Virus, 35 MMWR 376 (June 1986) (no extraordinary precautions necessary to sanitize dialysis machine after use by AIDS patients).

39 There is no evidence of insect-borne transmission of the virus, such as by mosquitoes. Drotman, Insect-Borne Transmission of AIDS?, 254 J. A.M.A. 1085 (Aug. 1985).

40 The only reported exception to transmission by blood, semen or vaginal fluids is a single instance of a mother who possibly transmitted AIDS to her infant through breast milk.

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The routes for transmission of the AIDS virus are limited in number.[41]

Recommendations for Assisting in the Prevention of Perinatal Transmission of Human T Lymphotropic Virus Type III/ Lymphadenopathy-Associated Virus and Acquired Immunodeficiency Syndrome, 34 MMWR 721, 722 (Dec. 1985) [hereinafter Perinatal]; see DoJ Memo, supra note 3 at 11, n.28. Of course, newborns have immature immune systems. See Davis, Histopathological Changes in the Thymus Gland, 12 Annals N.Y. Acad. Sciences 493, 495 (1986).

41 In order to protect the blood supply, in 1983 the CDC looked at clusters of AIDS cases and determined certain categories of people as being at higher risks for the disease (these "high-risk" groups were then listed as hemophiliacs, homosexual/bisexual men with multiple sex partners, intravenous (IV) drug users and Haitians). Prevention of Acquired Immune Deficiency Syndrome (AIDS): Report of Inter-Agency Recommendations, 32 MMWR 101 (Mar. 1983) [hereinafter AIDS Prevention.]. Unfortunately, identification of risk groups as opposed to risk behaviors has led some to misperceive the disease as being caused by being, or being in the proximity of, a homosexual or a drug user, rather than being a disease to which certain acts (some of which are sexual) render one susceptible. For example,

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Anal intercourse has been the predominant route among cases documented to date.[42] However, transmission via

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despite public perceptions to the contrary, lesbians are the group least likely to become infected. Gay Women and Risk of AIDS, L.A. Times, Apr. 2, 1986, at V1, col. 2.

Some still cling to the "high-risk group" terminology and simultaneously claim that many cases do not fall into any known risk group, a claim which seems calculated to create concern about possible "unknown" routes of transmission. See, e.g., DoJ Memo, supra note 3, at 4, n.3; see also note 55, infra.

42 Transmission by anal intercourse is not limited to the male homosexuals and bisexuals, but also poses a risk of transmission in the heterosexual community. Melbye, et al., Anal Intercourse As A Possible Factor in Heterosexual Transmission of HTLV-III to Spouses of Hemophiliacs, 312 New Eng. J. Med. 857 (Jan. 1985); Redfield, et al., Frequent Bidirectional Heterosexual Transmission of HTLV-III/LAV Between Spouses, Proceedings of the Second Int'l Conf. on AIDS (Paris) [hereinafter Paris Conf. Proc.] 125 (June 1986) [hereinafter Bidirectional].

Anal intercourse poses more of a risk for transmission than vaginal

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vaginal intercourse also is known to occur.[43] A single penile-vaginal

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intercourse because the walls of the rectum contain numerous blood vessels and are more easily torn. See AIDS, supra note 11.

43 Kreiss, et al., Antibody to Human T-Lymphotropic Virus Type III in Wives of Hemophiliacs, 102 Annals Internal Med. 623 (May 1985); Redfield, et al., Frequent Transmission of HTLV-III Among Spouses of Patients With AIDS-Related Complex and AIDS, 253 J. A.M.A. 1571 (Mar. 1985). Widespread misinformation about the manner of transmission has led many erroneously to believe that only those in high-risk groups will be exposed to AIDS virus. Nonetheless, a greater proportional increase in heterosexual transmission is expected. By 1991, it is estimated that 7,000 fully developed AIDS cases (9% of the total in the U.S.) will be the result of heterosexual transmission. Coolfont Rep., supra note 14, at 7, 13. In some African countries, vaginal intercourse already is believed to be the primary method of transmission. Mann, et al., Prevalence of HTLV-III/LAV in Household Contacts of Patients With Confirmed AIDS and Controls in Kinshasa, Zaire, 256 J. A.M.A. 721 (Aug. 1986). Further, while in 1983, 71% of the AIDS cases in Haiti were among individuals in groups regularly engaging in high-risk activi-

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contact may be sufficient.[44]

There is a public misconception that any personal bodily contact may spread the disease. However, kissing has never been documented as a transmission route.[45] This is also true for

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ties, by 1985, 71% of the cases were among individuals outside such groups. Women and AIDS, supra note 30; see also Culmeck, et al. Seroepidemiological Studies of HTLV-III Antibody Prevalence Among Selected Groups of Heterosexual Africans, 254 J. A.M.A. 2599 (Nov. 1985) (16% of heterosexuals in Zaire and Rwanda infected). But see Female-to-Male Transmission of HTLV-III (Letters) 255 J. A.M.A. 1702 (Apr. 1986). Thus, it is important that decisions with an impact upon persons exposed to the AIDS virus be made for the population as a whole and not be based upon unscientific moral judgments of certain high-risk group behavior.

44 Peterman, Study Documents Heterosexual Transmission, 1 AIDS Alert 5 (May 1986); Some experts believe the disease can be readily transferred heterosexually. Women and AIDS, supra note 30; Bidirectional, supra note 42.

45 Casual, supra note 7; see also Infrequency of Isolation of HTLV-III

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oral-genital sex.[46]

The most direct route of transmission is through exchange of blood products. This can occur when intravenous (IV) drug users share infected needles. In addition, until AIDS was recognized, and the nation's blood supply tested, transmission occurred through the transfusion of contaminated blood. Finally, newborn infants born of infected mothers may receive contaminated blood in utero.[47]

Virus From Saliva In AIDS, 313 New Eng. J. Med. 1606 (Dec. 1985); HTLV-III Exposure During Cardiopulmonary Resuscitation, 313 New Eng. J. Med. 1606 (Dec. 1985) (paramedics giving mouth-to-mouth resuscitation to infected individuals tested negative for antibodies to the virus).

46 See Casual, supra note 6; Lymon, et al., Minimal Risk of Transmission of AIDS-Associated Retrovirus Infection by Oral-Genital Contact, 255 J. A.M.A. 1703 (Apr. 1986).

47 See Mothers, supra note 18.

Transmission to hemophiliacs has been contained through new blood treatments.[48] Because condoms appear to be effective in preventing transmission of the virus via semen,[49] and because anal intercourse can be replaced with safer sexual practices,[50] transmission among male homosexuals and bisexuals has slowed as those groups have responded to

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48 Case for Concluding Heat Treated Licensed Anti-Hemophiliac Factor Is Free From HTLV-III, Lancet 890 (Oct. 19, 1985).

49 Condoms Prevent Transmission of AIDS-Associated Retrovirus, 255 J. A.M.A. 1706 (Apr. 1986). Indeed, an agency funded in part by a grant from the U.S. Department of Health and Human Services recommends condoms as the only necessary precaution for sexual practices by hemophiliacs. Hemophilia Info. Exchange, Hemophilia and Acquired Immune Deficiency Syndrome (AIDS): Intimacy and Sexual Behavior, AIDS Update 1 (Sept. 1985).

50 CDC, 1985 STD Treatment Guidelines, 34 MMWR (Supp.) 75S (Oct. 1985) (identifying safe sexual behaviors).

education.[51] Transfusion-associated transmission also has been contained through development of antibody tests.[52]

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51 Behavioral Changes, supra note 14. But see Moss et al., Progression to AIDS in Men Seropositive for LAV/HTLV-III: One-year Followups of San Francisco General Hospital Study, Paris Conf. Proc. 152 (June 1986) [hereinafter Progression]; Coolfont Rep., supra note 14, at 7, 12 (IV drug abusers are the major reservoir for transmission to the community at large). Because of the illicit nature of IV drug users' activities, they are the most difficult group to reach with education efforts. Id.; see also Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (finding no constitutional barrier to state anti-sodomy laws, which laws may make identification of those engaging in anal intercourse difficult, thereby impeding education of at-risk individuals); Paterat, et al. Serological Markers as Indicators of Sexual Orientation in AIDS Virus - Infected Men, 256 J. A.M.A. 712 (Aug. 1986) (two seropositive U.S. airmen, without known risk factor, who were tested for markers of several diseases associated with male homosexual behavior had results which placed the probability at 1 in 19,000 that they did not belong to homosexual high-risk group).

52 Provisional Public Health Service Inter-Agency Recommendations for

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These data demonstrate that transmission of the virus occurs almost exclusively via specific routes in which infected blood products, semen or vaginal fluids come into contact with another's blood. No evidence exists of "casual" transmission. Indeed, only two cases have been documented of transmission of the virus other than by the activities described above, both involving individuals acting as health care workers who failed to follow CDC guidelines while caring for AIDS patients.[53]

Screening Donated Blood and Plasma for Antibody to the Virus Causing Acquired Immunodeficiency Syndrome, 34 MMWR 1 (Jan. 1985).

53 One case concerned a mother responsible for her infected child's medical care. Although this woman behaved like a health care worker (drawing her child's blood through in-dwelling body

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The DoJ Memo's only support for its claim that the AIDS virus might be transmitted by casual contact consists of these two cases, a single instance of possible transmission through a mother's milk,[54] a subsequently retracted comment

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tubes and changing surgical dressings, among other things), she did not follow recommended CDC precautions for such individuals: she did not wear gloves or wash her hands immediately after blood or secretion contact. The CDC cautions against over-generalizing the risk factor from this case: "The contact between the reported mother and child is not typical of the usual contact that could be expected in a family setting." Apparent Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus From a Child to a Mother Providing Health Care, 35 MMWR 76 (Feb. 1986) [hereinafter Child To Mother]; see also DoJ Memo, supra note 3, at 11, n.30.

The other case concerned a health care worker who also did not follow recommended CDC precautions. She had prolonged contact with an AIDS patient's body excretions and secretions, and had chronic eczema on her hands so that her own blood was exposed to the patient's virus-containing fluids. Child to Mother, supra note 53.

54 Perinatal, supra note 40.

erroneously attributed to Dr. William Haseltine of the Harvard Medical School,[55] and the implication that cases of casual transmission lurk among what the Department of Justice inaccurately refers to as the "6%" of cases not classified in a high-risk group.[56]

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55 See DoJ Memo, supra note 3, at 13, n.38, (citing to Dershowitz, Crucial Steps in Combating the AIDS Epidemic; Emphasize Scientific Information, N.Y. Times, Mar. 18, 1986, at A27, col. 2). The substance of the comment attributed to Dr. Haseltine in the New York Times (that AIDS more than likely will be casually transmitted) was subsequently retracted and "clarified" in that same periodical. Dershowitz, On Transmission (Letter), N.Y. Times, Apr. 5, 1986, at 14, col. 8. As a result, the author of the DoJ Memo, Charles Cooper, publicly apologized to Dr. Haseltine, and added assurances from the Public Health Service that "non-sexual person-to-person contacts" in the workplace did not create a risk of transmission. U.S. Apologizes to AIDS Researcher, N.Y. Times, July 23, 1986, at D20, col. 4.

56 As of July 29, 1986, only 3.1% of cases to date are of unknown origin.

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Comprehensive research on those extensively exposed to persons with AIDS demonstrates that the AIDS virus is not spread by casual contact.[57] As a

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CDC 7/29/86 Rep., supra note 12). Moreover, although, 1,206 patients could not be placed in an identified at-risk group as of May 1985, further investigation has explained the lack of placement in nearly all cases. Update, supra note 28.

57 During the past five years over 1,750 health care workers who have treated AIDS patients have been studied. Of 666 who either had penetrated their skin with a contaminated needle or had splashed body fluids on mucous membranes (such as lips), only 26 tested seropositive and only three of these did not have an alternative possible means of transmission. Update: Prospective Evaluation of Health-Care Workers Exposed Via The Parenteral or Mucous-Membrane Route To Blood Or Body Fluids From Patients With Acquired Immunodeficiency Syndrome - United States, 34 MMWR 101 (Feb. 1985); Update: Evaluation of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infection in Health Care Personnel - United States, 34 MMWR 575 (Sept. 1985). In another investigation of 150 health workers with needle-stick

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result, the CDC has recommended that routine serologic testing for evidence of the AIDS virus is unnecessary for medical care workers, including those performing surgical, dental, or childbirth procedures.[58]

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injuries, not one was seropositive after four years, although some had severe penetrations. Henderson, et al., Risk of Nasocomial Infection With Human T-Cell Lymphotrophic Virus Type III/Lymphadempothy-Associated Virus in Large Cohort of Intensively Exposed Health Care Workers, 104 Annals Internal Med. 644, 647 (May 1986); see also Tsoukas, et al., "Risk of Transmission of HTLV-III/LAV From Human Bites," Paris Conf. Proc. 125 (six months after 30 health care workers were bitten or scratched by a brain-damaged hemophiliac with AIDS, none tested seropositive).

58 Recommendations for Preventing Transmission During Invasive Procedures, 35 MMWR 221 (Apr. 1986); see also Sacks, AIDS and a Surgeon, 313 New Eng. J. Med. 1017 (Oct. 1985) (two years after the death from AIDS of a surgeon who performed invasive procedures, no instance of seropositivity has been reported in any of 400 of his patients).

In no instance has a family or household member of over 17,000 AIDS patients, who was not the patient's sexual partner, contracted AIDS.[59] Seven studies of over 350 family members have failed to find any virologic evidence of transmission.[60]

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59 Child To Mother, supra note 53. But see note 53, supra.

60 Id. In one study, the contacts between family members included shared toothbrushes (7%), towels (37%), eating utensils (25%), dishes (46%), drinking glasses (48%), bed (37%), toilets (90%), and baths and showers (92%). Moreover, over 19% of the family members had kissed the patient on the lips and 83% had kissed on the cheek. Freidland, et al., Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients With AIDS or AIDS-Related Complex with Oral Candidiasis, 314 New Eng. J. Med. 344, 346 (Feb. 1986); see also Melbye, et al., Anal Intercourse As A Possible Factor In Heterosexual Transmission of HTLV-III to Spouses of Hemophiliacs, 312 New Eng. J. Med. 857 (Mar. 1985) (no members of any hemophiliac household, except sexual partners, have been found

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In light of the case against casual transmission, CDC has recommended that children infected with AIDS be permitted to attend school within limited precautionary guidelines.[61] Similarly, CDC has determined that persons with AIDS should be permitted unrestricted access to work in food service, health care, and other work settings.[62] Summarizing

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to be exposed to the virus). Compare above scientific studies with Brief of Cong. Dannemeyer, et al., at 19 n.7 (admitting that there are no known cases of transmission by saliva or air, but baldly asserting [based upon a miscitation to a publication that admits to being "biased in favor of believing the worst" about AIDS, McKeever, The Number One Issue, AIDS Update Newsletter 1 (Apr. 1985)] that there supposedly is a "consensus" among "some [unnamed] doctors" that AIDS may be passed by kissing, mouth-to-mouth resuscitation and sharing of glasses or toothbrushes).

61 Education, supra note 9.

62 Indeed, the CDC unqualifiedly has concluded that "[t]he kind of nonsexual

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all the data arguing against casual transmission, an editorial in the New England Journal of Medicine urged: "It is now time . . . to take a more influential and active role in quelling this hysteria over the casual transmission of AIDS."[63]

C. Protecting Persons Infected With The AIDS Virus Against Discrimination And Exclusion Would Not Adversely Affect The Public Health Powers Of Government.

Because transmission of the AIDS virus cannot occur casually,[64] the

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person-to-person contact that generally occurs among workers and clients or consumers in the workplace does not pose a risk for transmission of HTLV-III/LAV." Workers infected by the AIDS virus "should not be restricted from using telephones, office equipment, toilets, showers, eating facilities, and water fountains." Workplace, supra note 9, at 682, 694.

63 Casual, supra note 7.

64 See District 27 School Bd. v. Bd. of Educ., 130 Misc. 2d 398, 502 N.Y.S.2d

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prestigious American College of Physicians has adopted the position that

> [Q]uarantining persons with AIDS or persons who have been exposed to [the AIDS virus] . . . is an unjustified invasion of individual liberty and privacy. . . . [Q]uarantine . . . would not be productive. In fact, it would communicate a false sense of security . . . [so that some] might believe that the incarceration of such persons makes it safe to engage in sexual and drug practices known to transmit the . . . infection.[65]

Thus, the spectre painted by Petitioners

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325 (1986) (holding that children with AIDS were not required by law to be excluded from school system because the risk of transmission in the school setting is nonexistent).

65 Position Paper, supra note 33, at 578 (emphasis in original) (adding that quarantine likely would result in non-reporting of many cases and loss of cooperation of those whose activities place them at risk for the disease); see also Coolfont Rep., supra note 14, at 14; Local Health Officers Meet in Washington to Make Recommendations to Mayors, 3 AIDS Info. Exchange 1, 5 (Feb. 1986).

and others[66] of public health laws being rendered impotent as a result of coverage of AIDS under laws protecting the handicapped is without substance.

The medical profession has recommended that persons infected with the AIDS virus fully participate in life's activities, with all individuals (infected or not) remaining responsible for preventing exposure. Given the virus' limited routes of transmission, this is easily done, if people are adequately educated. Thus, quarantine is neither necessary nor constructive.[67]

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66 Brief of Petitioners, at 26-27, n. 5; Brief of the United States, at 16, n.14; Brief of Cong. Dannemeyer, et al., at 14-16.

67 The problem Petitioners and their amici pose is, in any event, nonexistent. If in extreme cirumstances, quarantine were justified for a particular individual because of real dangers to others in the workplace, that person would no longer be "otherwise qualified" under the Act. See infra, pp. 59-62.

II. THE LEGAL AUTHORITIES ESTABLISH THAT PERSONS INFECTED WITH THE AIDS VIRUS ARE PROTECTED UNDER THE ACT.

A. Persons Infected With The AIDS Virus Are Handicapped Within The Meaning Of The Statute.

A handicapped person, entitled to protection under Section 504 of the Act, is any person who has (1) a physical or mental impairment which (2) substantially limits one or more of a person's major life activities, as well as any person with a record of, or who is regarded as having, such an impairment.[68] The terms "physical impairment"

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68 Rehabilitation Act of 1973, 29 U.S.C.A. § 706(7)(B) (1985). Hence, not only can a person's impairment make the person handicapped, the way the person subjectively is viewed by others can do so also. Congress thus equated the rights of those mistakenly treated as handicapped with those with a verifiable medical impairment. This definition has no counterpart in other federal law. See, e.g., Social Security Act, 42

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and "major life activities" are elaborated upon by regulations.[69]

Under the regulations, a physical impairment includes:

> any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine. . . .

U.S.C.A. § 423(d) (1983) (generally requiring "medically determinable" impairment for determination of disability). See also U.S. Civ. Rts. Comm'n, Accommodating the Spectrum of Abilities 6-10 (1983) (calling the statute's approach a "major conceptual advance[]" and the "most comprehensive and useful definition to date").

69 These regulations have been approved by Congress. See Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1255 n.15 (1984). They also have been copied virtually verbatim by most federal agencies, including the Dept. of Justice, 28 C.F.R. § 41 and the Dept. of Education, 34 C.F.R. § 104.

45 C.F.R. § 84.3(j)(2)(i)(A) (1985). All persons with fully developed AIDS unquestionably have such physical impairments.[70]

So too do those who appear asymptomatic. In the terms of the regulations, those infected with the virus, even if asymptomatic, have a "physiological disorder or condition . . . affecting one or more" of the listed body systems: specifically the reproductive, hemic and lymphatic systems.[71] Moreover, those infected by the virus in many instances are regarded by others (although erroneously so) as

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70 See supra, pp. 12-17. Indeed, even the Justice Department has "little difficulty concluding that the disabling effects of AIDS on its victims constitute 'impairments.'" DoJ Memo, supra note 3, at 22.

71 See supra, note 18.

having the physical impairments of those with fully developed AIDS.[72]

Further, the physical impairments those with AIDS as well as those infected with the AIDS virus have (or are regarded as having) "substantially limit[ ] one or more of such person[s'] major life activities." 29 U.S.C.A. § 706(7)(B). The regulations specify that the term "major life activities" includes, but is not limited to "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. § 84.3(j)(2)(ii). In fully developed cases of AIDS, many (if not all) of these functions are substantially limited.[73]

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72 See discussion infra, at pp. 48-50.

73 See supra, pp. 12-17, describing among others, physical impairments which

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But those who remain asymptomatic throughout their normal lives also have an impairment of the blood and reproduction systems that "substantially limits one or more of such person's major life activities." Both procreation and sexual intercourse are substantially limited for such individuals because the virus is readily transmitted to sexual partners (especially by activity leading to conception) and to children so conceived.

Reproductive and related activities must be classified as "major life

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limit caring for oneself, performing manual tasks, learning and working (dementia), walking (neurological motor changes), seeing (cytomegalovirus retinitis) and breathing (PCP). Again, even the Justice Department admits that this test is met as to those with fully developed AIDS. DoJ Memo, supra note 3, at 22-23 and n.63 (noting that "AIDS limits the major life activity of resisting diseases").

activities." This Court repeatedly has recognized the centrality of procreation to the life of citizens: "The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights'. . . ." Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citations omitted).

Those infected with the AIDS virus must limit sexual activity, especially activity in which infected semen or vaginal secretions come into contact with a partner's bodily fluids,[74] which

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74 In many jurisdictions, willful exposure of another to disease is a crime. See, e.g., Cal. Health & Safety Code § 3353 (West 1979). Even when legality is not at issue, concern for a partner limits the sexual expression of those infected with the AIDS virus. A recent study of those voluntarily

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of course is exactly the activity needed for procreation. Limitations on procreative and sexual behavior do not arise solely out of concern for transmitting the virus to partners. The high risk of passing the infection to any child born to an AIDS-infected couple makes procreation undesirable and dangerous. Moreover, there is danger to the infected mother herself, since pregnancy places demands on an expectant woman's immune system that substantially increase the degree to which opportunistic infections

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testing for AIDS antibodies found that the most common reasons individuals test is out of concern for infecting others (71%). Even though there already have been considerable changes away from high-risk activities, more than half those questioned indicated that the test would further affect risk reduction behaviors. Dlugosch, et al., AIDS Antibody Testing: Evaluation and Counseling, 1 Focus: Rev. of AIDS Res. 1 (July 1986).

associated with AIDS can occur in her own body. Finally, there is some evidence that engaging in sexual activity increases the susceptibility of seropositive men to fully develop AIDS.[75]

In addition to having life-affecting impairments to their hemic, lymphatic, and reproductive systems, persons who are seropositive also are regarded as suffering the same impairments as those who have fully developed

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75 See supra, note 18; Perinatal, supra note 40; AIDS Prevention, supra note 41; and Progression, supra note 51. One commentator summarized the situation as follows: "For the individual, knowledge of virus infection spells almost inevitable personal anguish. Women are advised not to become pregnant, since they may infect the fetus. For men or women, pursuing marriage or even intimate relationships is fraught with extraordinary emotional trials." Eckholm, Screening of Blood for AIDS Raises Civil Liberties Issues, N.Y. Times, Sept. 30, 1985, A1, col. 2.

AIDS.[76] For example, the insurance industry has advocated mandatory testing to screen out seropositive persons on the assumption that these persons are likely to develop AIDS and incur associated health care costs.[77] Employers fear increased costs of employee benefits as well as negative publicity associated with AIDS and those who are seropositive.[78]

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76 The Justice Department further has admitted that someone who is only seropositive "may . . . be handicapped under Section 504 if he is perceived as suffering from the disability effects of AIDS or ARC." DoJ Memo, supra note 3, at 28 and 29 n.74.

77 See, e.g., Keppel, Insurers Try to Screen Out AIDS Cases, L.A. Times, § 4, at 1, col. 1 (Oct. 11, 1985).

78 See CCH, AIDS: Employer Rights and Responsibilities 29 (1985); see also Shipp, Physical Suffering is Not the Only Pain AIDS Can Inflict, N.Y. Times at A8, col. 1 (Feb. 7, 1986) (describing employer and public reaction to persons

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These examples illustrate the predicament faced by seropositive persons, most of whom may never develop any obvious debilitating symptoms. Solely because of the presence of the AIDS virus, these individuals are regarded as having AIDS and its associated problems. As a result, they face the same discrimination as do persons with fully developed AIDS.

To date, the only final reported AIDS employment discrimination case found the condition to be a handicap.[79]

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perceived as having AIDS). Because of a similar fear arising from the high costs of caring for AIDS patients, and despite opposition from public health officials in his department, Secretary of Health and Human Services Otis Bowen signed an order in February 1986 that would require testing of all permanent immigrants to the United States. Cimons, All Immigrants Face AIDS Test, L.A. Times, §1, at 1, col. 3 (Feb. 4, 1986).

79 Shuttlesworth v. Broward County Office of Management & Budget Policy,

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Federal administrative regulations and rulings are in accord.[80] Most

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FCHR 85-0624, slip op. (Fla. Comm'n on Human Relations, Dec. 11, 1985), reprinted in Daily Lab. Rep. (BNA) No. 242, E-1, E-5 (Dec. 17, 1985) (decided under statute modeled after § 504).

80 Persons with AIDS are presumed to be disabled under supplementary security income regulations. 20 C.F.R. § 416.934(k) (1986). Further, the Dept. of Health and Human Services Office of Civil Rights' ("OCR's") regional offices have concluded that AIDS and less-developed forms of the infection are covered under the Act. OCR Region IV Letter Ruling re Complaint No. 04-84-3096 (Aug. 5, 1986) (decided after release of DoJ Memo); OCR Region IX, Your Rights as a Person with AIDS or ARC (undated release); see also Education, supra note 9 (CDC considered the protection of handicapped AIDS-infected children under Section 504 in developing recommendations). Even an internal memo prepared by the civil rights division of the Justice Department prior to preparation of the DoJ Memo concluded that those suffering from AIDS or related conditions are entitled to protection under the Act. Note, AIDS and Employment Discrimination under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act, 20 U. Richmond L. Rev. 425, 432 (1986).

commentators also agree that discrimination against someone infected with the AIDS virus squarely falls within the scope of conduct prohibited by the Act.[81] Thus, individuals, infected with the AIDS virus are "handicapped individuals" within the meaning of Section 504 of the Rehabilitation Act.

Section 504 does not expressly exclude those infected with the AIDS virus (or any other disease which has a

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81 See, e.g., Note, supra note 80, at 439 ("Forcing employers to accept facts . . . and discontinue discriminatory practices has been the role of the courts in other areas of civil rights litigation and it is equally appropriate here"); Smith, et al., High Court Eyed for Guidance on AIDS as Handicap, Legal Times 35, 39 (June 30, 1986) ("In view of the 1 million or more Americans estimated to be infected with this AIDS virus, the Supreme Court may be understandably reluctant, without further legislative directive, to exclude contagious diseases from protection of the federal handicap law").

contagious aspect) from coverage. Petitioners and their amici hence make an unfounded attempt to establish an implied exclusion of contagious diseases from the Act's scope.[82]

Yet, in 1978, when Congress amended the statutory definition to expressly

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82 See Brief of Petitioners, at 25-28; see also Brief of Solicitor General at 16-18; Brief of Cong. Dannemeyer, et al., at 8-14. Indeed, their argument is not so much exclusion at all, but instead that individuals with diseases such as AIDS (or TB) supposedly are inevitably discriminated against "solely on the basis of" contagion (or expected future deterioration) and not on the basis of their handicapping conditions at all -- as if contagion (or deterioration) could somehow be divorced from other aspects of the handicapping condition. Rather, the contagion is an integral part of the handicapping condition. Discrimination on the basis of contagion, thus is discrimination on the basis of the handicap. To allow the facile distinction between the two would render the protection given by the Act to those with contagious (or deteriorating) diseases illusory. See infra, note 86.

exclude alcoholics and drug addicts whose current use of alcohol or drugs precludes adequate or safe job performance,[83] it chose not to exclude contagious disease from coverage.[84]

Adoption of a blanket implied exception for contagious diseases would undermine Congressional intent to evaluate each claimed handicap on an

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83 Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 706(7)(B) (1985). Significantly, even there, Congress did not entirely remove the handicapping conditions of alcoholism and drug addiction from coverage, but instead required case-by-case determinations as to whether each individual's current condition prevents adequate or safe job performance.

84 As this Court noted in Grove City College v. Bell, 104 S. Ct. 1211, 1217 (1984), because antidiscrimination laws arise from concerns of broad scope, this Court has been "reluctant to read [into the statute] a limitation not apparent on its face." Interestingly, the Solicitor General himself argued, in Bowen v. American Hospital Assoc., 106 S. Ct. 2101 (1986), Section 504.

individual basis, which the Act expressly contemplates. Courts routinely have effectuated this intent.[85]

Moreover, many disabilities that Congress defined as severe under related provisions are virally induced and therefore contagious in some way at some point in time.[86] Given the high

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85 See, e.g., Doe v. New York Univ., 666 F.2d 761, 775 (2d Cir. 1981) (evaluating claim of mental impairment by reference to plaintiff's medical records and treatment by defendant).

86 Rehabilitation Act of 1973, 29 U.S.C.A. § 706(13) (1985) defines a "severe handicap" requiring multiple services over an extended time period as a disability which results from, among other conditions, "blindness, cancer, multiple sclerosis, muscular dystrophy, neurological disorders (including stroke and epilepsy) paraplegia, guadriplegia, and other spinal conditions. . . ." Of these, many have a manifestation presumed contagious at some stage. For example, blindness is a symptom of cytomegalovirus retinitis; viruses are suspected of causing many forms of cancer, and the Epstein-Barr virus has been

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incidence of contagiousness in disabilities Congress explicitly intended to cover, this Court should not circumscribe the congressionally mandated definition of handicap under Section 504 by finding an implied exception for contagious diseases.[87]

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linked to lymphoma; multiple sclerosis, encephelitis, and polio are virally induced; and polio and Guillian-Barre Syndrome can result in paraplegia. Mandell, et al., Principles and Practices of Infectious Diseases (2d ed. 1984).

Courts also have regularly recognized persons with such diseases as falling within the protection of § 504. See e.g., Pushkin v. Regents of Univ. of Col., 658 F.2d 1372 (10th Cir. 1981) (persons with multiple sclerosis covered). See also Floum, The Federal Rights of Hansen's Disease (Leprosy) Patients at Kalaupapa, 6. U. Haw. L. Rev. 507 (1984) (noting HHS findings of coverage of those with leprosy under § 504). Many of these diseases, like AIDS, are contagious only in limited ways and may never affect the workplace. The differences among them further cautions against a broad ruling regarding "contagious" diseases.

87 The same holds true for any type of blanket implied exception for

(footnote continued on next page)

To prevent stereotypes and ill-founded fears from vitiating Section 504, contagiousness or risk to

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deteriorating or progressive diseases. Congress specifically protected the progressive and frequently deteriorating diseases of cancer, multiple sclerosis, muscular dystrophy, and cystic fibrosis, without regard to the potential progress of the condition. See Rehabilitation Act of 1973, 29 U.S.C.A. § 706(13) (1985). Further, at the time HEW promulgated its regulations HEW stated that it "continue[d] to believe. . . that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps." 45 C.F.R. Pt. 84, App. A at 310. Accordingly, courts have refused to speculate about the future development of a disease, see, e.g., Bentivegna v. Dept. of Labor, 694 F.2d 619, 623 (9th Cir. 1982) ("allowing remote concerns [about future health of diabetic] to legitimize discrimination would vitiate the effectiveness of section 504"). Rather, courts have held persons with progressive diseases also to be protected by Section 504. See, e.g., Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (person with epilepsy covered; remanded to determine if otherwise qualified); Plummer v. Branstad, 731 F.2d 574 (8th Cir. 1984) (Huntington's Chorea).

self and others should be permitted to justify differential treatment of a handicapped individual only when the risk of transmission of illness is significant, which is not the case with AIDS. In New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979), the court struck down under section 504 a decision of the State Board of Education to exclude certain mentally retarded children from school classes because they were carriers of the virus, hepatitus B. The court held that the Board failed to demonstrate that the health hazard posed by these children was "anything more than a remote possibility . . ." and that "the activities that occur in classroom settings were not shown to pose any signficant risk that the disease would be transmitted from one child to

another." Id. at 650. [88]

B. Persons Infected With The AIDS Virus Are Not, Solely By Virtue Of Their Infection, Automatically Rendered Not Otherwise Qualified For Any Job.

Employer fears cannot provide the underpinnings of an implied exception to coverage under the Act.[89] Concerns about contagiousness or risk to self and others are relevant only to whether a handicapped individual is "otherwise qualified" for the job.[90] Again,

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88 Cf. Doe v. New York Univ., 666 F.2d at 777 (requiring evidence of a significant risk of harm to self or others to justify exclusion of individual with history of mental illness); Mantolete, 767 F.2d at 1422 (rejecting a "mere elevated risk" standard).

89 Such fears readily can be likened to the "outmoded stereotypes" that employers historically have relied on to exclude and penalize women, and that this Court consistently has refused to sanction. See, e.g., Califano v. Goldfarb, 430 U.S. 199, 207 (1977).

90 The Eleventh Circuit remanded the present action for evaluation of the

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however, this determination requires a case-by-case evaluation of the individual's handicapping condition in relation to the specific requirements of the job in question. [91]

As shown above, persons infected with the AIDS virus are not contagious in the workplace and do not pose any risk of transmission to their co-workers. Contagiousness in other

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risk posed by Respondent's health condition. Arline v. School Bd. of Nassau County, 772 F.2d 759, 765 (11th Cir. 1985). Consequently, resolution of this question based on the present record is premature and the writ of certiorari as to this question should be dismissed as improvidently granted. See, e.g., Taggarty v. Weinaker's, Inc., 397 U.S. 223 (1970).

91 See Mantolete, 767 F.2d at 1423; see also Southeastern Community College v. Davis, 442 U.S. 397 (1979) (deciding whether hearing impairment rendered applicant for nursing program not otherwise qualified for reasons of patient safety).

settings is simply not relevant to whether they are "otherwise qualified" for a specific job.

Persons infected with the virus can work for years, both safely and well. Currently available evidence indicates most of these infected persons will remain asymptomatic. Only when and if they are no longer able to work or their performance is unsatisfactory may individuals infected with the AIDS virus be considered not "otherwise qualified." This must be so because, under section 504, only present job performance may be considered in determining whether a handicapped individual is "otherwise qualified" for a job.[92]

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92 Who should bear the social costs of AIDS is a policy decision requiring extensive study far beyond the scope of this case. Clearly, a decision on this

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CONCLUSION

Emotional reactions steeped in ignorance and prejudice are precisely the ill the Act was designed to counter. This Court should not sanction public hysteria as a justification for discrimination. Exclusion of persons infected with the AIDS virus from the workforce would wreak drastic consequences on millions of Americans and their families. Not only would victims be subjected to

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issue is premature and unwarranted in the present case.

As noted above, however, seropositive individuals cannot be barred from employment because of employers' speculative fears or concerns about future costs. Cf. Bentivegna, 694 F.2d at 623. Congress must have intended a policy which allows those who now are able to work to do so. Otherwise, discrimination based on concerns about later condition or the coverage of progressive disabilities caused by other diseases would have been specifically excluded instead of included. See supra, note 87.

extreme personal hardship,[93] but the nation's economic health would be strained by the millions of individuals forced to rely solely on public benefits for their living and medical expenses, whether or not they are actually incapable of productive employment.[94]

For the reasons set forth above, this Court must not extend the scope of this case nor issue a broad ruling which

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93 In addition to loss of needed financial support, being fired due to AIDS phobia can be traumatic and may harm the health of those with already lowered immune systems. See Welliseh, U.C.L.A. Psychological Study of AIDS, 19 Frontiers of Radiation Therapy & Oncology 155 (1985).

94 Moreover, if this Court were to permit, perhaps even encourage, employers to discharge those persons infected with the AIDS virus but whose bodies have fought progress of the disease, it would be weakening the very individuals whose systems may best fight the disease, and who offer our best hope for developing biological resistance to the disease.

might exclude persons infected with the AIDS virus from the protections of the Act.

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APPENDIX

APPENDIX

INTERESTS OF INDIVIDUAL AMICI CURIAE

This brief amici curiae is submitted on behalf of Doctors for AIDS Research and Education (DARE). DARE is composed of physicians and public health specialists dedicated to providing treatment to persons afflicted with Acquired Immune Deficiency Syndrome (AIDS), researching medical aspects of the disease, and educating the public about the AIDS virus and the individuals infected by it. As a whole, the members of DARE represent the fullest extent of medical knowledge and expertise currently able to be brought to bear on issues relating to AIDS. The following is a list of the members of DARE and their qualifications:

Neil Schram, M.D. is the present Chair of the Los Angeles City and County

AIDS Taskforce, the Kaiser Permanente AIDS Committee, and the ACLU Foundation of Southern California Ad Hoc Taskforce on AIDS and Civil Liberties. He is Assistant Clinical Professor of Medicine, UCLA School of Medicine and a staff doctor at Kaiser Permanente Medical Group of Southern California. He has treated large numbers of patients suffering from AIDS or AIDS-Related Complex (ARC).

Mervyn Silverman, M.D., M.P.H., is the current President of the American Foundation for AIDS Research. He is also Director of the Robert Wood Johnson Foundation AIDS Health Services Program. From 1977 to 1985 he served as the San Francisco Director of Health.

Gerald Friedland, M.D. is Associate Professor of Medicine and Associate Professor of Epidemiology and Social

Medicine at the Albert Einstein College of Medicine. He is also a physician at the Montefiore Medical Center, specializing in the treatment of persons with AIDS. He has treated more than 300 AIDS patients.

Donald Abrams, M.D. is Assistant Director of the Acquired Immunodeficiency Syndrome/Kaposi's Sarcoma Clinic at San Francisco General Hospital. He has treated more than 1,000 patients with acquired immune deficiency syndrome. He serves on the AIDS Advisory Committee of the San Francisco Department of Public Health and on the Scientific Advisory Committee of the AIDS Foundation of San Francisco. He presently is conducting clinical studies on Kaposi's Sarcoma, lymphadenopathy and opheresis in acquired immune deficiency syndrome-related conditions. He has

published over 35 articles on AIDS, as well as numerous book chapters on the subject.

Daniel William, M.D. is an instructor in clinical medicine at Columbia University in New York. He is Director of the AIDS Ambulatory Clinic at St. Luke's-Roosevelt Hospital Center. He is also a member of the American Medical Association AIDS Panel, the New York State AIDS Institute, and the Medical Advisory Board to the Gay Men's Health Crisis. He has published numerous articles on AIDS.

Harold Hawley, M.D. is Medical Director of the Whitman-Walker Clinic. He is a member of the District of Columbia Taskforce on AIDS and is Associate Pathologist for Microbiology at the Washington, D.C. Veteran's Administration Medical Center.

Alexandra Levine, M.D. is Executive Associate Dean and Professor of Medicine at USC School of Medicine. She is involved in AIDS research in the areas of treatment, natural history, specific drugs, and treatment and evaluation. She has treated over 500 people infected with the AIDS virus.

David Ostrow, M.D., Ph.D. is Director of the Psychobiology Program, University of Michigan School of Medicine. He is a member of the Steering Committee of the National Multi-Center AIDS Cohort Study and a member of the AIDS Expert Advisory Panel for the American Medical Association. He is organizer and Chairperson for the Chicago Area AIDS Taskforce and Chairperson for the Chicago Department of Health, AIDS Advisory Panel. He also organized the International AIDS Prospective

Epidemiology Network. He has worked with over 200 patients with AIDS.

Dennis McShane, M.D. is Acting Chief of Rheumatology at Palo Alto Veteran's Administration Hospital and Clinical Assistant Professor of Medicine at Stanford University. He founded the American Association of Physicians for Human Rights, and served as its President in 1982/83. From 1983 to 1986, he served on the Stanford Medical Center's AIDS Taskforce. In addition, Dr. Shane presently serves on the California AIDS Budget Taskforce and the California AIDS Strategic Planning Commission. He also presently chairs the Stanford Medical Center AIDS Committee. He has treated up to 100 people with AIDS and many more with ARC.

Peter Heseltine, M.D. is the Chief Physician and Hospital Epidemiologist of

the Los Angeles County/USC Department of Epidemiology, and Assistant Director of the Los Angeles County/USC Medical Center AIDS Clinic, which sees about one third of all patients with AIDS in Los Angeles County. He served as Coordinator of the USC AIDS Study Group in 1983/84. He presently is supervising a research study on health worker AIDS transmissions. He has treated more than 600 patients with AIDS.

Joel Weisman, D.O. co-directs the largest non-public AIDS unit in the country, located in Sherman Oaks, California. He is one of the doctors who first identified the clinical syndrome of AIDS and reported the syndrome to the Centers for Disease Control. He serves on the faculty of the UCLA Department of Medicine. He has treated more than 500 patients with AIDS and more than 1,500 patients with ARC.

James Lipsett, M.D. is Associate Director of the City of Hope National Medical Center, Division of Radiation Oncology, and an instructor at the USC School of Medicine. He serves on the Medical Advisory Committee for AIDS Project Los Angeles.

Stuart Nichols, M.D. is Associate Chief of Medical and Psychiatric Services at the Methadone Maintenance Treatment Program, Beth Israel Medical Center, New York City, and Senior Instructor in Psychiatry, Mount Sinai School of Medicine, City University of New York. He has edited a book entitled, Psychiatric Implications of AIDS, and written a chapter on psychotherapy and AIDS in another book. He has given numerous lectures on AIDS at conferences all over the United States. He serves as an AIDS consultant to the National

Institutes of Mental Health, Drug Addiction, and Allergy and Infectious Diseases. He also serves on the AIDS Committee of the American Psychiatric Association and the New York City District Branch Taskforce on AIDS. He has seen more than 500 patients with AIDS.

Roger Detels, M.D. is Professor of Epidemiology at UCLA School of Public Health, and served as Dean of that school from 1980 to 1985. He serves on the American Foundation of AIDS Research's Scientific Advisory Committee, and on the Southern California CARES Professional Advisory Taskforce for AIDS Project Los Angeles. He also serves as Chair of the Analysis Committee for the Multi-Center AIDS Cooperative Study. He has published articles on AIDS and has completed a study on the natural history of AIDS in gay men.

Constance Wofsy, M.D. is Co-Director of AIDS Activities at San Francisco General Hospital, and is Assistant Chief of the Infectious Diseases Division there. The AIDS clinic she oversees treats over 1,000 patients with AIDS or ARC each month. Dr. Wossy is the principal investigator for Women's AIDS Research and Education. She has researched the development of AIDS opportunistic infections and heterosexual modes of transmission. She also has lectured and published extensively on the subject of AIDS.

Nick Ifft, M.D. is one of the founding members of the Philadelphia AIDS Taskforce, and has served as its president since 1983. He has treated over 90 patients with AIDS and over 200 patients with ARC in the first six months of 1986.

Michael Roth, M.D. is Assistant Clinical Professor at U.C.L.A. Department of Medicine, Clinical Immunology and Allergy Section. He is co-chair of the California AIDS Commission and a member of the California Assembly Budget Task Force on AIDS. He serves on the staff of the U.C.L.A. AIDS Center, and as medical advisor to AIDS Project Los Angeles and the Los Angeles City Council. He has published numerous articles on AIDS and has treated over 200 persons with the disease.

Michael Kaiser, M.D. is the Director of Emergency Care at Children's Hospital in New Orleans, Louisiana, and Clinical Assistant Professor, Department of Pediatrics at both Louisiana State University School of Medicine and Tulane University Medical Center. He has lectured extensively on AIDS and HIV

testing. He is the leading pediatric expert on AIDS in Louisiana.

Allen McCutchan, M.D. is a Clinician and Associate Professor in the Division of Infectious Diseases, San Diego Medical Center, University of California. He serves on the University of California Taskforce on AIDS and has treated more than 150 people with AIDS.

Nicholaos Bellos, M.D. is Chief Medical Resident of Tulane University Affiliated Hospitals in New Orleans. He is a member of the Louisiana State Taskforce on AIDS and Chair of the Case Funding/ Public Awareness Subcommittee. He has treated more than 50 patients with AIDS.

Peter Wolfe, M.D. is former Associate Director of the UCLA AIDS Center. He is presently Assistant Clinical Professor of Medicine at UCLA School of

Medicine. In his private practice, he has treated several hundred patients with AIDS. He has published numerous articles on AIDS.

Hal Freeman, M.A. is a licensed psychotherapist. From January 1984 to February 1986, he served as Regional Director in the Office for Civil Rights, United States Department of Health and Human Services, Region IX, San Francisco, and served as Deputy Director for that office from 1968 to 1984. He now works with patients with AIDS and ARC and with AIDS-fearful persons.

Thomas Mundy, M.D. is Adjunct Assistant Professor of Pediatrics at UCLA School of Medicine and an attending staff physician at Children's Hospital, Los Angeles. He currently is researching the natural history of infection by the AIDS virus in

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William Christopher Mathews, M.D. is a Robert Wood Johnson Clinical Scholar at UCLA Medical Center and the Veteran's Administration Hospital, Westwood, California, where he practices acquired immune deficiency syndrome health services. He has treated over 60 patients with AIDS and over 300 patients with ARC. He also served on the San Diego Mayor's Taskforce on AIDS from 1985 to 1986, and presently serves on the AIDS Health Services Program of the Robert Wood Johnson Foundation.

Norbert Gilmore, M.D. is Associate Professor at the McGill University

Department of Medicine, and Associate Physician at the Royal Victoria Hospital in Montreal, Quebec. He chairs the Canadian National Advisory Committee on AIDS, and is a member of the Quebec AIDS Committee and the Canadian Health Association's Public Education Committee on AIDS. He has researched the epidemiology of AIDS and treated more than 60 persons with AIDS.

Marshall Forstein, M.D. is the Medical Director of the Gay and Lesbian Counseling Service, and the AIDS Action Committee in Massachusetts. He has treated over 100 patients with AIDS and many with ARC.

David McEwan, M.D. is the Chief of Family Medicine at Honolulu Medical Group. He served as President of the AIDS Foundation of Hawaii from 1983 to May 1986. He presently serves on the

Honolulu Mayor's Advisory Committee on AIDS and on the University of Hawaii's Ad Hoc AIDS Committee. He has treated more than 35 patients with AIDS and 150 patients with ARC.

A. Brad Truax, M.D. is a general medical practitioner in San Diego, California, whose practice is 75% AIDS-related. He has treated more than 75 patients with AIDS. He also has lectured and published articles on AIDS. He currently serves as Chair of the San Diego County Regional AIDS Taskforce, and is a member of the San Diego Mayor's Taskforce on AIDS.

Amy Ross, Ph.D. is a pathologist. She is an Adjunct Instructor, Department of Anatomy, USC School of Medicine. She has researched and published extensively on issues involving AIDS.

Robert Bolan, M.D. is an Assistant Clinical Professor at the University of California Division of Family and Community Medicine, and Medical Director of the Gay Health Care Clinic of the Presbyterian Hospital in San Francisco. He serves as President of the San Francisco AIDS Foundation, and as a member of the San Francisco Department of Public Health AIDS Coordinating Committee, the AIDS Taskforce of the Director of the San Francisco Department of Public Health, the San Francisco Mayor's AIDS Advisory Taskforce, and the San Francisco AIDS Foundation Board of Directors. He has treated more than 100 persons with AIDS and more than 300 with ARC.

Brian Willoughby, M.D. is a Staff Doctor at St. Paul's Hospital, Vancouver, British Columbia, Canada, and

is a staff member of the AIDS Care Team in Vancouver. He serves on the Advisory Board of AIDS. He also does research and has published articles on AIDS. He has treated more than 20 patients with AIDS.

James Cherry, M.D. is Professor of Pediatrics and Chief of the Division of Infectious Diseases at the U.C.L.A. School of Medicine Center for the Health Sciences. Since 1983, he has been involved in a study on the risk of contracting AIDS admidst health workers.

Kent Sack, M.D. has worked as a clinician in an AIDS-Related Complex (ARC) clinic for five years for the San Francisco City Health Department. Over 7,500 people with ARC have been seen in the clinic.

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No. 85-1277

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OCTOBER TERM, 1986

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA,
et al.
Petitioners

v.

GENE H. ARLINE
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF SENATORS CRANSTON, ET AL. AND OF REPRESENTATIVES ATKINS, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the contagious, infectious disease of tuberculosis constitutes a "handicap" within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

2. Whether one who is afflicted with the contagious infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF SENATORS CRANSTON, ET AL. AND OF REPRESENTATIVES ATKINS, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE[1]

This amicus brief is submitted on behalf of Senators Alan Cranston, Daniel Inouye, Edward Kennedy, Paul Simon, Robert Stafford, Lowell Weicker, and Representatives Chester Atkins, Les AuCoin, Howard Berman, Mario Biaggi, Barbara Boxer, Sala Burton, John Conyers, Ronald Dellums, Mervyn Dymally, Don Edwards, Vic Fazio, Barney Frank, Bill Green, Augustus Hawkins, Charles Hayes, James Jeffords, Mel Levine, Mike Lowry, Matthew Martinez, Robert Matsui, Stewart McKinney, George Miller, Bruce Morrison, James Scheuer, Patricia Schroeder, Louis Stokes, Gerry Studds, Edolphus Towns, Henry Waxman and Ted Weiss. Some of the amici

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[1]. Letters from the parties as consenting to the filing of this brief are being filed with the Clerk.

were Members of Congress when Section 504 was originally enacted. Senators Cranston, Kennedy and Stafford served in 1972 on the Subcommittee on the Handicapped of the Labor and Public Welfare Committee, which actually drafted Section 504 in that year.

Many of the amici serve on the committees of the Senate and the House which have jurisdiction over either Section 504 of the public health laws. For example, Senator Weicker is Chairman of the Senate Subcommittee on the Handicapped, which has jurisdiction over the Rehabilitation Act. Representative Hawkins is Chairman of the House Education and Labor Committee, which has jurisdiction over Section 504, and Representative Jeffords is the ranking Republican member of that committee, as well as the author of the 1978 Amendments to

Section 504. Representative Waxman is Chairman of the House Subcommittee on Health and the Environment, which has jurisdiction over all public health and health regulatory and financing issues. As Members of Congress who are responsible for legislating civil rights and public health issues, Amici offer this brief to assist the Court in reaching its decision.

SUMMARY OF ARGUMENT

The Court has accepted certiorari on two questions. With regard to the first, amici argue that the plain language of the statute, its legislative and regulatory history, and its construction by this and other courts demonstrate that Section 504 unambiguously prohibits discrimination against individuals who have or are perceived to have contagious diseases.

With regard to the second question, amici argue that this question must be answered on the basis of the factual issues that each case presents. Amici believe that the Court of Appeals was correct in citing the numerous factual issues that require resolution at the trial court level and in issuing a remand order. Section 504's statutory and regulatory scheme was developed to resolve questions such as those raised by this case. Thus, on remand, the question of whether Respondent was "qualified" to continue her employment with the Nassau County school system can be answered within the context of Section 504. That context acknowledges safety and health concerns and reinforces the policies of the public health laws.

I. DISEASES WHICH ARE CLASSIFIED AS CONTAGIOUS OR DECISIONS MADE ON THE BASIS OF CONTAGION ARE NOT EXEMPT FROM SECTION 504 COVERAGE

A. Introduction

Two different arguments are presented by the petitioner and the Department of Justice (hereafter referred to as DOJ) both of which would shield any adverse action against a person with a communicable disease from scrutiny under Section 504. The first argument is that contagious diseases are simply exempt from statutory coverage. Petitioner's Brief (hereafter Pet. Br.) pp. 14ff.; DOJ Br. pp.7ff. The second is that adverse decisions against handicapped persons which are based on contagion, whether accurate or inaccurate, are not decisions based on handicap and therefore are not subject to Section 504. Id. This

section will demonstrate that both of these arguments are wholly inconsistent with the letter and intent of Section 504. Application of Section 504 to communicable diseases is necessary to effectuate Congressional intent. Amici do not seek, and would oppose, any interpretation of Section 504 that would require exposing school children, or any other individuals, to an appreciable risk of contracting a serious disease.

1. Clarification of the Underlying Issues

Before addressing these arguments directly, it is critical to clarify some underlying issues. First, petitioner and DOJ repeatedly and incorrectly equate coverage under Section 504 with remedy. As in other civil rights laws, a finding that a

plaintiff is a member of the protected class does not establish illegal discrimination, nor does it guarantee a remedy. Rather, coverage under the statute simply requires the court to scrutinize a recipient's actions to assure that an otherwise qualified handicapped person was not denied participation in a covered program on the basis of handicap.

The petitioner also equates communicable diseases with the present ability to transmit the disease to third parties. As explained by the amicus briefs of the American Medical Association (AMA) and the American Public Health Association (APHA), this may be erroneous in a given case. These equations of coverage and remedy and communicable disease with present ability to transmit result in a misleading

characterization of the issue before the Court. See e.g. Pet. Br. p. 19.

Finally, it is also important to point out that the threshold question of whether a plaintiff is a "handicapped person" extends beyond the area of employment. This initial finding is necessary to challenge any denial of participation in or the benefits of any of recipients' programs or activities, such as, education, welfare or health services, recreation, and housing. Hence, an exemption of contagious diseases would have far-reaching results in areas other than employment. Not only could a person with tuberculosis who had been successfully treated and was no longer contagious be precluded from any employment opportunity, but a similarly situated child could be precluded from attending school, and a

patient with a history of tuberculosis could be denied admission to a federally funded hospital or nursing home.

2. The Justice Department's Separation of Contagion From the Underlying Disease Is Both Illogical and Contrary To Congressional Intent

The Department of Justice presents a far-reaching attack on Section 504 coverage by arguing that even if contagious diseases are covered and even if a person with a contagious disease is handicapped within the meaning of the statute,[2] if the recipient based its action on the belief that the person was contagious -- whether correct or

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[2]. The Department of Justice is willing to concede that Ms. Arline is so "handicapped," DOJ Brief p. 12, but argues that the "extent of any physical disability actually suffered by Arline is wholly irrelevant to the Section 504 inquiry in this case." Id.

erroneous -- there is no Section 504 coverage because actions on the basis of contagion are not actions on the basis of handicap. DOJ attempts to separate the ability to communicate a disease from the disease for purposes of Section 504 analysis and the entirety of its argument rests on this separability premise. In fact, the two cannot be separated. One cannot simply be contagious. One must be contagious in the sense of being capable of infecting others with a specific disease. Thus, the School Board fired Arline because it was concerned that she might communicate tuberculosis. Without the underlying handicap there would be no fear of contagion.

The Department of Justice states that a decision based on contagion against a handicapped person with a communicable

disease is like a decision based on height against a deaf or blind person. (DOJ Brief, pp. 10-11). The error in this analogy is obvious. Contagion, at some times and in some circumstances, is the primary characteristic of "communicable diseases" (AMA Brief p. 2, n. 2), whereas height is totally unrelated to blindness or deafness. A decision made on the basis of contagion against a person with a communicable disease is more analogous to a decision made on the basis of height against a midget. In both cases the utilized criterion is an inherent characteristic of the handicap, and the question whether the use of the criterion constitutes illegal discrimination turns on the qualifications for the program in question.

In the case of communicable diseases, the ability to infect others may be a legitimate disqualifying criterion in certain circumstances but may be erroneously applied in others. A person with such a disease may not be contagious or if contagious will not transmit the disease. The correct application of this criterion will depend upon provable facts. For example, if a disease can be transmitted only by biting, a two-year-old might be excluded from a program but an adult would not.

The Department of Justice and Petitioner attempt to isolate a particular characteristic of a handicap, and ask this Court to declare that discrimination based on that characteristic is beyond the scope of Section 504. This argument has far reaching consequences, not only in Section

504 cases but in other areas of civil rights as well. It would require this Court to depart from existing precedents and would undermine all disparate impact analyses. For example, in the context of race discrimination, a requirement that stewardesses not have broad noses or large lips has been held to be discriminatory against blacks. EEOC Dec. No. 70-90, 1 F.E.P. 236 (1960). Further, a height requirement is not only relevant as applied to midgets who, by definition, all share the characteristic, but also as applied to women, Asians, Latins and Mexican Americans. Dothard v. Rawlinson, 433 U.S. 321 (1977); Craig v. City of Los Angeles, 626 F.2d 659 (9th Cir. 1980), cert. denied, 450 U.S. 919; U.S. v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978); Officers for Justice v.

CSC, 395 F. Supp. 378 (N.D. Cal. 1978). While showing a disparate impact is not necessary in this case because contagion (at some point) is a primary characteristic of tuberculosis and other communicable diseases, the judicial recognition that members of protected classes can challenge the use of a physical characteristic which is common to the class, defeats Petitioner's and DOJ's attempt to separate and shield decisions made on the basis of a characteristic of a handicapping condition - - contagion.[3]

3. Section 504 Prohibits Handicap Discrimination Based Upon Irrational But Honestly Held Beliefs

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[3]. Section 504 incorporates "effect" discrimination. Alexander v. Choate, 469 U.S. 287 (1985); 45 CFR Part 84, Appendix A (May 4, 1977).

Petitioner and the Department of Justice argue that a handicapped person is protected only if the recipient based the adverse action on an actual or perceived physical or mental limitation in functioning. Hence, according to their reasoning, a handicapped person who was perfectly qualified for a job would be stripped of all Section 504 protection as long as the employer asserted a reason other than the physical or mental inability of the person to participate in a given program -- contagion, aversion, fear of increased medical or insurance expenses, superstition, or any other inaccurate but honestly held belief. If this reasoning were allowed to prevail, Section 504 would be destroyed.

Congress was well aware that the greatest barrier faced by disabled people was the

uninformed, stereotyped and prejudicial attitudes held by others. The belief that handicaps are contagious has been among the stereotypes faced by disabled people. For example, both epilepsy and cancer have been thought to be contagious by the general public.[4] The belief that someone with a communicable disease is actively contagious beyond the period of actual contagion, is no less a stereotype and adverse action may be no more justified. Congress chose to prohibit all actions based on irrational, prejudicial or simply inaccurate reasons

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[4]. See, O. Temkin, The Falling Sickness: A History of Epilepsy from the Greeks to the Beginnings of Modern Neurology, 114-17, 226-27 (2d ed. 1971); Note, "Legal Recourse for the Cancer Patient-Returnee: The Rehabilitation Act of 1973," 10 Am. J. of Law and Medicine 309 (1984).

that excluded and segregated handicapped people.

B. The Plain Language of the Statute and the Legislative History Reveal Congress' Intent That Section 504 Be Interpreted Broadly and That It Applies to Contagious Diseases [5]

1. The Plain Language of the Statute Demonstrates That Section 504 Covers Communicable Diseases

There is no basis whatsoever for carving out an exemption from 504 coverage for communicable diseases.[6] There is nothing in the language of the statute and regulations

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[5]. Amici are pleased to inform the Court that Respondent has adopted their analysis of the legislative history of Section 504.

[6]. The record in this case presents an easy case for determining whether tuberculosis is a "handicap" within the meaning of Section 504. Ms. Arline's respiratory functions were seriously affected and she required hospitalization due to the illness. J.A. 11. Moreover, she was fired on the basis of contagion.

to indicate an exception for impairments which are classified as communicable.

As stated by this Court in North Haven Board of Education v. Bell, 456 U.S. 512, 520 (1982), "[o]ur starting point in determining the scope of [Section 504] is, of course, the statutory language." Section 504 defines handicapped person to include:

> any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. 706(7)(B)

According to the reasoning of North Haven, which construed Title IX of the Education Amendments of 1972, "There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language . . . Because §901(a) neither expressly nor

impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these `persons' unless other considerations counsel to the contrary." North Haven, 457 U.S. at 521. The same reasoning applies to Section 504, and it contradicts the suggestion of Petitioner that the absence of the words "tuberculosis" or "contagious diseases" in the statutory definition implies an intent to exclude persons with such diseases from the coverage of the Act. Pet. Br. p. 24. If Congress had chosen to exclude communicable diseases, it could have done so in the same manner that it addressed questions about drug and alcohol abusers. See, infra, at pp. 29ff.

As demonstrated below, Congress and the Department of Health, Education and Welfare

specifically chose not to provide an exclusive list of handicapping conditions in order to provide broad statutory coverage. Congress was well aware that a wide variety of conditions fell within the broad regulatory definitions (e.g., cancer, drug addiction, alcoholism) and indicated its approval.[7]

Moreover, the plain language of the statute also refutes Petitioner's position that discrimination must be based on an actual or perceived functional limitation in order to fall within Section 504. Pet. Br.

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7. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632 (1984) (Congress itself endorsed the regulations in their final form); Alexander v. Choate, 469 U.S. at 293 n. 13 (1978 Amendments to the Act were intended to codify the regulations enforcing Section 504); See infra, discussion of Section 504 regulations and Congress' role in reviewing and approving them.

15-16. Clearly, by including those persons with a history of a handicap Congress intended to cover persons with "no actual incapacity at all," Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). According to Petitioner and DOJ, a person with a history of polio may be excluded from a recipient's program so long as the employer holds the good faith but ignorant belief that the person is currently contagious. This intepretation of Section 504 defies the plain language of the statute.

2. Legislative History Demonstrates That Congress Intended Section 504 To Be Interpreted Broadly

According to North Haven, 456 U.S. at 521, this Court should next look to the legislative history of the Act "for evidence as to whether Congress meant somehow to

limit the expansive language of [Section 504]." A review of the legislative history of Section 504 reveals an intent to define handicap broadly to include even those handicaps which sometimes pose safety risks and to bar discrimination against qualified handicapped persons regardless of the motive for the exclusion.[8]

The early legislative history of Section 504 dispels the notion presented by DOJ that only adverse action which is based on actual or perceived inability or limitation is subject to scrutiny under Section 504. For

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[8]. Contrary to the Department of Justice argument, Congress never based its prohibition against discrimination on discriminatory intent. As this Court noted, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by discriminatory intent." Alexander v. Choate, 469 U.S. at 476.

example, DOJ asserts that "discrimination motivated by an aversion to a cosmetic disfigurement would not, absent a perceived or actual nexus to a disabling condition, constitute handicap discrimination under Section 504." DOJ Brief p. 15. The core of DOJ's argument is that the condition constituting the reason for exclusion (i.e., contagion) must itself constitute a "handicap" in order for Section 504 to become operative. ("Contagion" is not a "handicap" DOJ Br. pp. 5, 6, 12, and passim). So, since "aversion" is not a handicap, a recipient may discriminate against a person whose facial disfigurement does not impair their mental or physical abilities. And therefore, since "increased insurance costs" is not a handicap, an exclusionary practice, based on this reason

would also not be covered by the statute. This reasoning does violence to the letter and spirit of Section 504.

In introducing the predecesor bill to Section 504,[9] Congressman Vanik recounted the various ways that handicapped persons are subjected to discrimination. Stereotyped views about ability were recognized as a major barrier. However, Congressman Vanik also cited unfounded fears about safety as resulting in discrimination.

> In the past, the reason for excluding these children from their right to an

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[9].See Alexander v. Choate, 469 U.S. at 304 n. 13 (1985). "Given the lack of debate devoted to Section 504 in either the House or Senate when the Rehabilitation Act was passed in 1973, ... the intent with which Congressman Vanik and Senatory Humphrey crafted the predecessor to Section 504 is a primary signpost on the road toward interpreting the legislative history of Section 504." Id.

> education has never been very clear. At times handicapped children were seen as a physical threat or as uneducable.
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> * * *
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> We have employers who fear to hire the handicapped believing that the handicapped are more likely to have accidents, thus raising workers' compensation rates, and insurance costs.[10]

Vanik, 117 Cong. Rec. 45974 (Dec. 9, 1971).

A case cited by Congressman Vanik illustrates that aversion alone, independent

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[10]. Numerous studies have refuted the basis for fear of increased accidents or insurance costs. Report commissioned by Congress under Section 130 of the Rehabilitation Act of 1973, P.L. 93-112, and reported back to Congress prior to the 1978 Amendments to Section 504, Urban Institute, Report of the Comprehensive Service Needs Study, citing, at 318, Bureau of Labor Statistics, U.S. Department of Labor, Bull. No. 123, The Performance of Physically Impaired Workers in Manufacturing Industries (1948); U.S. Bureau of Labor Standards, U.S. Department of Labor, Bull. No. 234, Workers Compensation and the Physically Handicapped Worker 10 (1961).

of an actual or perceived inability to function in a recipients' program constitutes illegal discrimination. "In one case a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school because his teacher claimed his physical appearance `produced a nauseating effect'on his classmates." Id. [11]

Senator Humphrey cited similar examples when he introduced his corollary bill in the Senate. "But too often we keep children, whom we regard as `different' or a

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[11]. DOJ states on p. 15 that this example is distinguishable from the case of aversion to a cosmetic disfigurement which does not constitute an actual or perceived limitation. The cases are indistinguishable on the relevant point -- in both cases the adverse action is based on aversion and not on actual or perceived inability which DOJ throughout its brief states as a prerequisite to Section 504 coverage.

`disturbing influence' out of our schools and community activities altogether, rather than help them develop their abilities in special classes and programs." 118 Cong. Rec. 423 (1972)

Senator Mondale similarly described a woman "crippled by arthritis" who was denied a job because the "college trustees didn't like the idea of her working as a clerk at the college because `normal students shouldn't see her.'" 118 Cong. Rec. 36761 (Oct. 17, 1972).[12]

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[12]. Again to emphasize, this legislative history is relevant because DOJ's whole theory depends on the premise that only actions taken on actual or perceived inability to function are covered by the statute. This is the basis for DOJ's argument that even an admittedly handicapped person is not protected if the employer's reason was contagion rather than inability to function. (DOJ Br. pp. 15, 21).

When Section 504 was first passed in 1973, the definition of handicap was narrowly limited to individuals who had a physical or mental disability which constituted or resulted in a substantial handicap to employment and could reasonably be expected to benefit in terms of employability from vocational rehabilitation services under the Act.[13] In 1974 Congress broadened the definition in relationship to the non-discrimination provisions of the Act. The 1974 legislative history leaves no doubt that Congress intended to define broadly those included under the protection of the Act.

Introducing the new definition, Senator

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[13]. P.L. 93-112; See S. Rep. No. 93-1297, 93rd Cong., 2d Sess. 37-38 (1974).

Cranston[14] stated: "The new definition in section 7(6) of the act is meant to include a broader group of handicapped persons who suffer from discrimination practices in employment, and participation in certain services and programs even though their handicap may not affect job performance or may even no longer exist."
120 Cong. Rec. 30531 (Sept. 10, 1974) (emphasis added). "Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation,

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[14]. Senator Cranston chaired the Subcommittee on the Handicapped for purposes of consideration of the 1973 Rehabilitation Act and acted as floor manager.

education, health services, or any other Federally-aided programs." Id. at 30534.

Senator Cranston made it clear that persons who experienced discrimination on the basis of prior medical history alone (whether or not there was an actual or perceived functional limitation), were handicapped within the meaning of the new definition. In fact, the motivation of the recipient was not the determining factor, but instead whether the classification (real or perceived) resulted in exclusion.

> The amended definitions of section 7(6) is also intended to make clearer that the coverage of sections 503 and 504 extends to persons who have recovered -- in whole or in part -- from a handicapping condition, such as a mental or neurological illness, but who may nevertheless be discriminated against on the basis of prior medical

> history and to persons who were inappropriately classified as handicapped (for example, mentally ill or mentally retarded) and where such inappropriate or incorrect classification has resulted in that person's inability to participate in all the activities covered by section 503 and 504.

Id. (emphasis added)

The new definition also made clear that Congress meant to address any adverse action based on handicap whether or not the person was in fact handicapped. S. Rep. No. 1297, 93rd Cong.,2nd Sess. 6389-91 (1974).

> Further, the amended definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as Title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. Id.

Hence, neither the 1974 or the 1978 legislative history contains a drop of "evidence that Congress meant somehow to limit the expansive language of Section [504]." North Haven, 456 U.S. at 521. In fact, this legislative history makes it clear that Congress did not intend to exempt handicapped persons from coverage because of safety concerns. Rather, Congress was assured that the Section 504 "qualified" requirement was sufficient to address safety concerns.[18]

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[18]. As this Court has acknowledged, Congress was extensively involved in the formulation of the H.E.W. Section 504 regulations, which govern in this case. As stated in Consolidated Rail Corp., 465 U.S. at 632, "the responsible congressional committees participated in the formulation, and both these committees and Congress itself endorsed the regulations in their final form." See also, Alexander v. Choate, 469 U.S. 287.

The legislative history reveals that particular attention was given to the definition of handicapped person and its interpretation by the Department of Health, Education, and Welfare (HEW). During Congress' review of the regulations promulgated to enforce Sections 501, 503 and 504, a question was raised regarding the HEW and Justice Department interpretations of handicapped person to include alcoholic and drug abusers.[16] The issue arose because of an interpretation by airlines holding federal contracts that the affirmative action obligations of Section 503 required them to hire unqualified alcoholics and drug addicts as pilots. In response to these

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16. The agencies' interpretation was based on an opinion by the Attorney General in 1977. 43 A.G. Op. 12 (April 12, 1977).

safety concerns, the House passed a bill exempting drug addicts and alcoholics from the definition of "handicapped person."[17] The Senate bill which was later adopted rejected this broad exemption in favor of a narrow exemption which simply clarified that employers are not required to hire handicapped individuals who were not qualified.[18]

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17. H.R. 12467 (1978).

18. 29 U.S.C. §706(7)(B) provides:

> For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a

The legislative history of this provision makes it clear that the Senate understood that the amendment was technically unnecessary but agreed to it in order to facilitate agreement with the House at conference.[19] Hence, since the amendment merely reinforced Congress' understanding of Section 504, it provides guidance for interpretation of the statute in cases raising issues of safety.

As stated by Senator Williams,[20]

> It is unfortunate that any group of handicapped persons

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direct threat to property or the safety of others.

19. Senator Randolph, the majority manager of the bill stated, "It [the amendment] will be helpful to us as we go to conference with the House." 124 Cong. Rec. 30322 (Sept. 20, 1978).

20. Senator Williams was Chairman of the full committee of Labor and Public Welfare and was a primary author and sponsor of the 1973 Rehabilitation Act.

> should be singled out for special treatment under the nondiscrimination provisions of the act. However, because of misunderstandings and distortions concerning employment rights of alcoholics and drug dependent persons, Members of the Senate have been under pressure to adopt language that would exclude alcoholics and drug dependent persons from all protection under sections 503 and 504 of the Rehabilitation Act. Indeed, the House-passed bill, H.R. 12467, includes such language.
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> The amendment offered by Senator Cannon is a compromise that would protect such persons from discrimination but would reassure employers that it is not the intent of Congress to require any employer to hire a person who is unqualified for the position or who cannot perform competently in his or her job. 124 Cong. Rec. 30322 (Sept. 20, 1978).

* * *

> Section 504 of the act requires that otherwise qualified handicapped individuals shall not . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.
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> The significant word here is "qualified." Sections 503 and 504 both state explicitly that covered employers need hire only "qualified" handicapped individuals. Id.

* * *

Senator Hathaway also explained that the amendment was technically unnecessary.

> While I do not believe that a clarifying amendment really is necessary, I support the pending amendment as a vast improvement over the corresponding language in the House-passed bill.
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> The purpose of the pending amendment is to meet

> the concerns of employers . . . that persons whose alcoholism or drug abuse impairs their capacity to perform particular jobs or participate in particular activities need not be employed in those jobs or be permitted to participate in those activities.
>
> Regulations implementing section 503 and 504 already address these concerns. They make clear that the protections of sections 503 and 504 only apply to otherwise qualified individuals. 124 Cong. Rec. 30324 (Sept. 20, 1978). (emphasis added)

Senator Williams concluded the debate by reiterating that the need for the amendment arose from "misunderstandings" about the operation of Section 504, that it "simply makes explicit what prior interpretations of the act have found" and that the principal is "implicit in the act's limitation" to

qualified handicapped persons. 124 Cong. Rec. 37509 (Oct. 14, 1978).[21]

Hence, even when presented with a dramatic safety concern, the qualifications of airline pilots, Congress chose to simply reiterate the principle underlying the Act--that a handicapped person must be "qualified" to participate in the recipient's program in order to prevail in a Section 504 case, but that safety issues must be analyzed in the Section 504 context of examining the facts presented in a given case. Petitioner is in essence asking this

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[21]. HEW enforced the statutory clarification through letters and policy statements, since no regulatory change was required. See, e.g., HEW Memorandum from Assistant Secretary for Health to the Secretary, "Nondiscrimination on the Basis of Handicap: Alcoholism or Drug Abuse," June 28, 1978, cited in Silverstein and Kamil, Handbook for the Implementation of Section 504, 153-4 (2d Ed., April 1981).

Court to adopt the House approach of creating a broad exemption of a class of handicapped people, which was explicitly rejected by Congress when it was specifically presented with this option.

The 1978 legislative history further evidences Congress' intent to define "handicapped person" broadly to cover diseases and to bar discrimination on any basis against qualified handicapped persons. As Senator Hathaway stated:

"In defining "handicapped individuals" for the purposes of sections 503 and 504, the law does not list specific impairments or disabilities to be covered." 124 Cong. Rec. 30325 (Sept. 20, 1978).

H.E.W. further explained the definition

in the 1977 regulations that were reviewed and approved by Congress in 1978 [22]:

> The definition does not set forth a list of specific diseases or conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list . . . .

45 C.F.R. Part 84, Appendix A at 375.

In a letter to Secretary Califano, acknowledging H.E.W.'s interpretation of the regulations to include persons with cancer, Senator Humphrey stated:

> Early diagnosis and improved methods of treatment have lowered the recurrence rate of major forms of cancer. At the same time, a growing number of former cancer patients are seriously and unjustly impaired in their ability to fulfill personal,

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22. Consolidated Rail Corp., 465 U.S. at 624; Alexander, 469 U.S. at 309.

> family and community responsibilities by their inability to secure employment upon recovery. This situation is too frequently the result of irrational fears or prejudice on the part of employers or fellow workers.
>
> I know you agree with me that persons who have suffered a serious illness should not have their misfortune compounded by an arbitrary denial of the right to employment upon recovery, or when they are able to work.

123 Cong. Rec. 13515, 16 (May 4, 1977). Petitioner's and DOJ's argument would ignore the scope of the problem presented by Senator Humphrey and acknowledged by Secretary Califano that irrational fears (including a belief that cancer is

contagious) and other prejudices act as "unjust barriers." Id.[23]

Hence, the legislative history makes clear that the fact that contagious diseases may pose safety risks, in certain circumstances at certain times, does not justify a broad exemption from coverage under Section 504. The legislative history further refutes DOJ's position that the motivation of the employer and its reason for taking an adverse action are controlling for purposes of coverage. Contagion is a characteristic of a communicable disease and

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[23]. A person with a history of cancer or current cancer which is in remission may have no actual or perceived functional limitation. In this sense, the person with cancer is analogous to the person with the cosmetic disfigurement which Justice would exclude from coverage unless "the disfigurement is regarded, rightly or wrongly, as implying an impairment in the strict sense." DOJ Br., p. 15.

such characteristics of handicapping conditions cannot function as bars to participation unless they in fact render the person unqualified. As demonstrated in the briefs filed by the American medical Association and the American Public Health Association, in the vast majority of cases a person with the "contagious disease" of tuberculosis will be non-infectious and pose no risk to others. A recipients' adverse action based on contagion in such circumstances is no different from the variety of situations which Congress addressed in passing and amending Section 504.

3. Section 504 Does Not Interfere With the Enforcement of the Public Health Laws But, Rather, Aids in Their Enforcement

Petitioner and amici also argue that coverage of contagious diseases would interfere with public health law enforcement, and therefore this Court should assume that Congress intended to exempt contagious diseases from coverage under Section 504. First, imputing an exemption by silence is contrary to the approach developed by this Court as set forth above. In fact the same Senate committee which authored Section 504, the Committee on Labor and Public Welfare, had jurisdiction over all public health programs. The chairman of that Committee, Senator Williams, was a primary sponsor of Section 504. Interestingly, immediately following the debate on the inclusion of drug addicts and alcoholics in the definition of "handicap" under the Act, the committee proceeded to

consider amending the Public Health Act to extend, inter alia, to disease control programs.[24]

Second, public health law concerns many areas of health besides contagious diseases (e.g., drug and alcohol programs, maternal and child health program, mental health, mental retardation, genetic disease screening, nutrition, and health planning). Petitioner's position would therefore eliminate all coverage where an overlap exists.

Third, the enforcement of Section 504 reinforces public health policies. As the amicus brief for the American Public Health Association demonstrates, the public health laws depend upon individuals and their

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[24]. 124 Cong. Rec. 30324 (Sept. 20, 1978).

doctors reporting communicable diseases. If such individuals must fear the loss of jobs and federally funded benefits as a result of such testing and reporting, they will cease to provide the critical data necessary to effectuate public health measures.

Finally, public health concerns can be easily reconciled with Section 504. As demonstrated below, Courts have adequately addressed safety concerns in a variety of situations and could easily incorporate public health concerns relating to contagion in the "qualified" analysis of Section 504. See American Public Health Association amicus brief.

The purpose of Section 504 in this context is to assure that public health standards are in fact the basis of recipient's decisions, rather than

irrational and uninformed judgments which serve only to undermine public health goals. This exact concern was addressed by Congress in relation to the extensive involvement of public health officials in the area of alcohol and drug abuse.

Responding to the House amendment which would have excluded all alcoholics and drug addicts "in need of rehabilitation" from the statute, Senator Williams stated:

> Public health authorities recognize that the most effective approach to treating drug addiction or alcoholism is to maintain some form of treatment or counseling long after the client has ceased to abuse drugs or alcohol and is perfectly capable of safe, effective job performance.
>
> * * *
>
> To add to the stigma by excluding such persons from protection under this law

> would only serve to encourage them to deny they have a problem rather than to admit it and to seek treatment. This would be a dangerous step backward in the Nation's efforts to bring alcoholism and drug abuse under control.

124 Cong. Rec. 30323, 24 (Sept. 20, 1978)[25]

II. TUBERCULOSIS IS A HANDICAP WITHIN THE MEANING OF SECTION 504

Amici refer the Court to the facts about tuberculosis set forth in the briefs of the APHA and the AMA. These facts are sufficient to determine that tuberculosis constitutes a handicap under Section 504. Once a person is diagnosed as having

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[25]. This is strikingly similar to the reaction of the public health community to the June 20, 1986 pronouncement by DOJ that persons with AIDS are not covered by Section 504. "Application of Section 504 of the Rehabilitation Act to persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus."

tuberculosis, the person by definition has a "physiological disorder or condition" affecting (in pulmonary cases) the "respiratory" system. 45 CFR §84.3(j)(2)(i). Hence, such a person has a physical impairment within the definition of "handicap." 45 CFR §84.3(j). In most cases the person will manifest symptoms such as fatigue, weight loss, and coughing, and, before treatment, will be contagious. All or any of these symptoms will substantially limit major life activities as defined within the first prong of the regulations. 45 CFR §84.3(j)(2)(ii).

A person who has been successfully treated has a history of an impairment that substantially limits major life activities and is therefore a handicapped person within

the second prong of the statutory definition. 45 CFR §84.3(j)(2)(iii).

If, as in this case, the recipient acts on the belief that the respondent is contagious, then the respondent "has a physical impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation." 45 C.F.R. 84.3(j)(2)(IV)(A). Finally, if the person does not actually have tuberculosis but the recipient bases an adverse action on the belief that the person has contagious tuberculosis, then the person "has none of the impairments defined in paragraphs (j)(2)(i) but is treated by a recipient as having such an impairment." 45 CFR 84.3(j)(2)(IV)(2).

It would be ironic indeed if a recipient's adverse action against a peron with a physical impairment that did not substantially limit major life activities were allowed to escape Section 504 scrutiny. As this Court stated in Southeastern Community College, 442 U.S, at 405-6 n. 6, "A person who has a record of, or is regarded as having, an impairment may at present have no actual incapacity at all. Such a person would be exactly the kind of individual who can be otherwise qualified to participate in covered programs."

Hence, if a recipient takes an adverse action based on tuberculosis, including its effects, then the recipient has taken an action based on handicap within the meaning of Section 504. Whether that action constitutes illegal discrimination

prohibited by the statute can only be established after an individual factual determination of whether the person is "otherwise qualified" to participate in the recipient's program.

III. PERSONS WITH TUBERCULOSIS ARE NOT PER SE EXCLUDED FROM BEING QUALIFIED TO TEACH ELEMENTARY SCHOOL. RATHER, AN INDIVIDUAL FACTUAL DETERMINATION IS REQUIRED

A. The Facts About Tuberculosis Do Not Justify A Blanket Exclusion

As set forth in the amicus brief submitted by the AMA and the APHA, there is no factual basis for a blanket rule excluding all persons with tuberculosis from any employment opportunity, including elementary school teaching. A rule which foreclosed employment opportunities to the thousands of successfully treated tuberculosis patients is precisely the type

of result which Congress sought to avoid in enacting Section 504.

As recognized by this Court in Consolidated Rail Corporation, Congress' explicit purpose was to enhance the employment opportunities of handicapped citizens. Past histories of handicapping conditions and unfounded fears associated with handicaps cannot serve to preclude participation by otherwise qualified handicapped persons in employment. A person trained as a teacher who contracts tuberculosis and is successfully treated or can be accommodated cannot be forever foreclosed from teaching without wholly undermining Congress' intent in passing Section 504. Congress could have addressed safety concerns through the use of generalizations about, for example,

communicable diseases. Instead, Congress and the regulatory agencies adopted a factual, case by case analysis through the requirement that individuals with disabilities be "qualified" for the program in question.

B. Decisions Regarding Handicapped Persons Based on Fear of Contagion Must Be Analyzed In the Same Manner As Other Safety Related Decisions

Section 504 provides a framework for considering safety concerns which has been easily applied by courts presented with such cases. Allegations of safety risks posed by contagion can be analyzed in a similar manner.

The Equal Employment Opportunity Commission, the agency given lead authority for employment discrimination under Section 504, has promulgated regulations which

provide that: "Qualified handicapped person means ... with respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question without endangering the health and safety of the individual or others." 29 C.F.R. §1619. (emphasis added) These regulations are consistent with those governing the other federal agencies, including the Department of Education.

Concerns about health and safety may be as baseless as other stereotypes about disabled people. The function of Section 504 is to separate myth from realty. The mere assertion of health or safety risks, even if based on medical opinion, does not end the inquiry. Virtually every Section

504 employment case involves disputed medical evidence.[26]

> The court's task is to see that the appropriate legal standard for making a factual determination is followed by the [recipient] . . . . Clearly, deference to a [recipient's] fact finding is inappropriate where the agency is a defendant in a discrimination suit. The [recipient] is required to come forward in district court with sufficient evidence to rebut plaintiff's prima facie case."

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[26]. Often "medical" evidence is offered on issues which are not within the expertise of doctors, such as wehther a disabled applicant is qualified to perform job functions. Medical evidence may be no more predictive of job performance than other "scientific" job entry tests. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Medical opinion may represent a philosophical bias. As stated in Grube v. Bethlehem Area School District, 530 F. Supp. 418, 423 (E.D. Pa. 1982), "It was apparent to the court that the school system['s] [doctor] [was] making a philosophical and not a medical judgment."

New York Association of Retarded Citizens v. Carey, 612 F.2d 644 (2d Cir. 1979). Where safety risks are proven in fact,[27] and cannot be eliminated through reasonable accomodation,[28] the courts have held that the handicapped applicant or employee is not "otherwise qualified." Southeastern Community College, 442 U.S. 397. However in many cases, alleged safety concerns are innaccurate or based on generalizations

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[27]. The exact formulation of the standard for evaluating risks has been stated in a variety of ways, but all balance the rights of handicapped persons with the legitimate safety concerns of employers. No single formulation for all safety cases is appropriate. Rather, the court must examine the medical facts about the disability as well as the nature of the program, how it is operated, and what accommodations are possible.

[28]. All Section 504 regulations define "qualified" in the employment context to include consideration of reasonable accommodation. See, e.g. 28 C.F.R. §41.32 (Department of Justice).

(Pushkin v. Regents, 658 F.2d 1372 (10th Cir. 1981); not job-related (Bentivegna v. Department of Labor, 604 F.2d 619 (9th Cir. 1982); or can be reasonably accomodated (Strathie v. Dept. of Transportation, 716 F.2d 227 (3rd.Cir. 1983).

C. A Remand Is Necessary To Determine Whether Ms. Arline Was Qualified For a Job Within the School District

Section 504 requires an individual factual inquiry as to whether the particular handicapped individual was qualified for the position in question. The fact that Ms. Arline was at some point contagious does not end the inquiry as to whether she was qualified to continue to teach. The Court of Appeals was correct in remanding the case for further factual findings as to whether she could have been accommodated, rather

than dismissed. A that a simple leave of absence might have been sufficient to assure that she was no longer contagious before returning to work. Or, a transfer to a job teaching older students might have eliminated safety risks (as the public health officer testified, J.A. 15, 16, 19) especially since such a transfer was consistent with school district policy (J.A. 57). If Ms. Arline was denied a leave or a transfer which would have been granted for a non-handicapped related reason, a case of non-discrimination would be established. If the school district feared future relapses, an accommodation of periodic testing may have been sufficient to eliminate the uncertainty. See APHA brief, p. 9.

Ms. Arline has been wholly foreclosed from continuing in her chosen profession See

Respondent's Brief. Such a drastic consequence cannot be justified under Section 504 unless the school district can demonstrate that Ms. Arline posed a safety risk that could not be accommodated. Amici agree with the American Medical Association and the American Public Health Association that the record is insufficient to make such a determination.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1986

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA AND CRAIG MARSH, INDIVIDUALLY AND AS SUPERINTENDENT OF SCHOOLS OF NASSAU COUNTY, FLORIDA,

Petitioners,

v.

GENE H. ARLINE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE EPILEPSY FOUNDATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE EPILEPSY FOUNDATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The Epilepsy Foundation of America is a non-profit corporation founded in 1968 to advance the interests of the over two million Americans with epilepsy through research, vocational programs, public information and education, professional awareness, and advocacy.

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[1]Copies of letters giving consent by both parties to the filing of this brief have been filed with the Clerk of this Court.

The term "epilepsy" evokes stereotyped images and fears, which affect persons with this medical condition in all aspects of life, including, and especially, employment. Since its inception, the Epilepsy Foundation of America has stood against the stigma and estrangement associated with epilepsy and has supported the development of laws which protect individuals from discrimination based on these stereotypes and fears.

The Epilepsy Foundation of America has a strong interest in the outcome of this case. Of specific concern to the Foundation are the issues surrounding the interpretation of the definition of handicap under Section 504 of the Rehabilitation Act which are raised by the brief of the U.S. Department of Justice as an *Amicus Curiae* in support of Petitioner. The Epilepsy Foundation of America is concerned that adoption of the Justice Department's analysis would have a drastic impact on the availability of Section 504 as a remedy for persons with epilepsy, as well as other handicaps who have been treated adversely due to fears and stereotypes about the effects of their handicaps.

SUMMARY OF ARGUMENT

This case calls upon the Court to decide whether the United States Court of Appeals for the Eleventh Circuit was correct in finding that respondent, who has a disease which under some circumstances may be contagious, meets the definition of "handicapped individual" under the Rehabilitation Act of 1973. 29 U.S.C. §701 *et seq.* This is in fact a very narrow question. It is easily answered in the affirmative upon an examination of the relevant law and legislative history.

Both petitioner[2] and the United States Department of Justice (DOJ), however, have attempted to enlarge the scope of this Court's inquiry by urging the court to hold that Section 504 of the statute, 29 U.S.C. §794, does not cover decisions based upon irrational fears about the effects of handicaps, even where they would concede that the handicap itself meets the statutory definition.[3]

Section 504 of the Rehabilitation Act of 1973 was specifically designed to prevent persons with handicaps from being denied participation in life's activities, including employment, based on irrational fears and prejudices about their conditions.

Throughout history, persons with epilepsy have been the subjects of discriminatory decisions due to irrational fears and stereotypes about epilepsy. The Rehabilitation Act has been of major importance in their efforts to overcome society's fears and to achieve fair treatment in the workplace. Allowing fears, however rational or irrational, to justify adverse employment decisions would render the Act meaningless and would give credence and legitimacy to the worst types of prejudice in our society.

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[2]Although Petitioner does not make this argument formally in its brief, it has filed with the Court a copy of the United States Department of Justice memorandum entitled "Application of Section 504 of the Rehabilitation Act to Persons With AIDS, AIDS-Related Complex, or Infection with the AIDS Virus." (June 20, 1986), which first stated the DOJ's view of Section 504's applicability to diseases that may be contagious.

[3]*Amicus* adopts the discussion of why tuberculosis is a handicap within the meaning of Section 504 which is contained in Section II of the Brief on Behalf of Senators Cranston, *et al.*, and Representatives Atkins, *et al.*, in Support of Respondent (hereinafter cited as the Congressional Brief).

An appropriate framework, which balances the rights of the individual and society's interests in safety, exists under Section 504 of the Rehabilitation Act for evaluating decisions not to hire, or as in this case, to fire, a handicapped employee. This framework requires an individualized assessment of whether, based upon the objective facts about her condition, respondent was able to perform the essential functions of her job without a reasonable probability of substantial harm to the public. Therefore, *amicus* urges this Court to affirm the Eleventh Circuit's remand of this case to determine whether respondent was in fact a handicapped individual who was otherwise qualified for her position.

ARGUMENT

I. THE REHABILITATION ACT IS A REMEDIAL STATUTE DESIGNED NOT ONLY TO PROTECT PERSONS WITH HANDICAPS FROM DISCRIMINATION BASED UPON THEIR CONDITION BUT ALSO TO PROTECT PERSONS WITH HANDICAPS FROM DISCRIMINATION BASED ON FEAR AND PREJUDICE ABOUT THEIR CONDITION.

In the Brief of the United States Department of Justice as *Amicus Curiae* in support of Petitioner (hereinafter cited as the DOJ brief), the Department claims that adverse decisions against persons with handicaps which are based on a fear of contagion, whether rational or irrational, are not decisions based on handicap and therefore are not subject to Section 504.

This court should reject the Department of Justice's view as doing great violence to the meaning and integrity of Section 504 as well as to the intent of the Act's framers. Adoption of this analysis would render the Act meaningless for persons whose disabilities carry a history of fear

and misperception,[4] and who have been struggling for years to be judged based on their real abilities instead of on stereotype.

The essence of the Justice Department's argument is that Section 504 is very limited in its application because it only applies to decisions which are based on a belief about the person's actual physical or mental abilities, and not about any of the effects of his impairments. Thus, since contagiousness does not actually cause a physical or mental impairment which substantially limits a major life activity, a fear about contagion, whether rational or irrational, is not actionable.

This analysis is inherently flawed, and fails upon close examination. It is not possible to separate the effects of a disease from the disease itself. One can no more separate contagiousness or the perception of contagiousness from a condition such as tuberculosis, than one can separate the effects of having seizures from the seizure disorder itself.

A review of the history of epilepsy provides a salient example that fear, rather than the handicap itself, is the ma-

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[4]Epilepsy is not the only condition which carries with it a history of fear and misunderstanding. Persons with cancer, Hansen's Disease (leprosy), cerebral palsy and others have all been subject to discriminatory decisions based on prejudice and fear. Similarly, tuberculosis continues to carry the stigma which developed at the time it was a relatively untreatable and thus highly contagious disease. As the Brief of the American Medical Association in Support of Petitioners points out, modern medicine can render tuberculosis non-infectious within days or weeks of diagnosis. AMA Brief at 7. However, as the court below suggests, employers continue to make judgments about persons with tuberculosis that are not based on objective medical information, but are rather "reflexive reactions grounded in ignorance or capitulation to public prejudice." *Arline v. School Board of Nassau County*, 772 F.2d 759, 765 (11th Cir. 1985).

jor impetus for discrimination against persons with handicaps.

A. Despite Medical Advances in the Treatment of Epilepsy, Societal Attitudes Toward Persons With Epilepsy Continue to Reflect Misunderstanding and Fear.

The person with epilepsy is most often far less handicapped in fact by his seizures than by society's fear and misunderstanding of the disorder.[5] Unfortunately, societal reactions to the condition have not kept pace with scientific understanding of the complexities of the brain and medical advances in treatment of epilepsy.[6] Based on the most recent survey of representative adults by the American Institute of Public Opinion (Gallup Poll), in 1979 six percent (6%) of the American population still objected to their children associating with persons with epilepsy, nine percent (9%) still believed persons with epilepsy should not be employed, three percent (3%) believed that epilepsy was a form of insanity, and nearly one out of five (18% percent)

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[5]Gallup, *Introduction* to Arangio, *Behind the Stigma of Epilepsy* (1975).

[6]Epilepsy is a collection of symptoms which result from a temporary and sudden disturbance in the normal pattern of the electrical activity of the brain. These symptoms are called seizures. The type of seizure that occurs depends upon the nature and location of the disturbance in the brain and thus, seizures range from the blink of an eye to convulsions accompanied by a lapse of consciousness. The treatment of choice for epilepsy is antiepileptic medication, which now make it possible for fifty percent of all persons with seizures to live seizure-free lives, and an additional twenty-five to thirty percent to achieve significant partial control of their seizures. For most persons with epilepsy this seizure control has allowed them to lead normal lives, with the physical ability to work at jobs of their choice without significant risk. *See* U.S. Department of Labor, Employment and Training Administration, *Interviewing Guides for Specific Disabilities: The Epilepsies* (1984).

adults stated they would object to a son or daughter marrying a person with epilepsy.[7]

Although acceptance of epilepsy has improved considerably since the first public opinion survey was taken in 1949, the stigma of epilepsy remains a social force affecting the lives of persons with the condition.[8]

1. Societal Attitudes Toward Persons With Epilepsy Reflect a Long-Standing History of Fear and Prejudice About the Condition.

Although modern medicine now understands epilepsy to be a medical condition which results from excessive electrical discharges in the brain, throughout history, epilepsy was considered a frightening and horrible disease which afflicted both body and soul through the influence of unnatural forces such as demons, moon madness, or witchcraft.[9]

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[7]Caveness, W.F., and Gallup, G.H., Jr., *A Survey of Public Attitudes Toward Epilepsy in 1979 with an Indication of Trends Over the Past Thirty Years,* 21 Epilepsia 509 (Oct. 1980).

[8]Report of the Commission for Control of Epilepsy and Its Consequences, U.S. Department of Health, Education, & Welfare, *Plan for Nationwide Action on Epilepsy,* Volumes I, II (DHEW Publication Nos.: NIH 78-276 and 78-312 (1978) (hereinafter cited as the *Commission Report*), Volume II, Part I at 492. The first Gallup Poll on epilepsy indicated that 43% of those interviewed objected to their children associating with people with epilepsy, 41% thought epilepsy was a form of insanity, and 45% thought people with epilepsy should not be employed. Caveness & Gallup, *supra,* note 7.

[9]Epilepsy was known to the ancients well before Hippocrates rightly diagnosed it as stemming from an injury to the brain. The Egyptians were aware of epilepsy; they had already refined techniques of brain surgery which were disclosed in the treatises during the Middle Kingdom. *Commission Report, supra,* note 8, Volume II, Part I at 492. Unfortunately, the Egyptian treatises and Hippocrates' notes were not widely read or accepted.

To the ancients, the person with epilepsy was an object of horror and disgust, someone to be avoided at all costs. Individuals were advised to spit before a person with epilepsy in order to ward off his evil spirits and were told not to eat or drink out of his dishes for fear of catching the condition.[10]

Similarly, in the Middle Ages, persons with epilepsy were seen as having "evil breath" which could infect all those around them.[11] While this belief was discarded by scientists at the end of the fifteenth century, it reappeared again in the eighteenth century when it was observed that the mere sight of a seizure could provoke seizures in an onlooker.[12]

In the nineteenth century, persons with epilepsy were also considered mentally disturbed and potentially violent or homicidal. In 1848, the British Ministry of Labour issued a pamphlet which stated:

> [E]pileptics are commonly believed to be mentally imbalanced, dull, or frankly mentally defective, liable to progressive mental deterioration, awkward to live with, antisocial or potentially criminal, incurable, resistant to all forms of medicine, unemployable, and persons who should be sequestered in institutions.[13]

These various beliefs about epilepsy led to horrible treatment of persons with seizures, ranging from physical violence to extreme physical isolation such as incarceration in

[10]O. Temkin, *The Falling Sickness* (1971) at 114.

[11]*Id.* at 115.

[12]*Id.* at 117.

[13]Fox, *The Epileptic in Industry,* 11 British Journal of Physical Medicine 140-144 (September-October 1948).

institutions.[14] Although today violent societal reactions do not threaten the lives of people with epilepsy, subtle but widespread aspects of discrimination have led persons with epilepsy to adopt roles as socially isolated individuals. One federal court has summarized this "historically based" perception of epilepsy as follows:

> Society's view, including that of professional medical personnel, is/was that epileptics are/were socially disfavored and viewed as persons who are subnormal.

Smith v. Adm. of Veterans Affairs, 32 Fair Empl. Prac. Cas. (BNA) 986, 990 (1983).

These attitudes and beliefs have also been reflected in American laws and policies throughout this century.[15] Since 1900, nineteen states have had statutes that either prohibited or severely restricted the rights of people with epilepsy to marry and conduct a normal family life.[16]

[14]For example, in Scotland in the Middle Ages, men with epilepsy were subject to castration and pregnant women with the disorder were buried alive. O. Temkin, *supra* note 10, at 132-133. In the eighteenth and nineteenth centuries persons with epilepsy were locked away in institutions and characterized as insane or violent. Brody, *Epilepsy: Dispelling the Myths,* N.Y. Times, April 19, 1978 Sec. III. at 13, col. 1.

[15]*See generally,* Finesilver, *The Legal Aspects of Epilepsy,* in EPILEPSY REHABILITATION, 51-65 (G.N. Wright, Ed., 1976) *See also,* Fabing and Barrow, *Medical Discovery as a Legal Catalyst: Modernization of Epilepsy Laws to Reflect the Medical Progress,* 50 Nw. U.L. Rev. 42, 46 (1955); and Masland, *Epileptics: Their Medicolegal Problems and Confrontations,* 7 Lawyer's Medical Journal 339 (2d Series) (1979). Epilepsy Foundation of America, *The Legal Rights of Persons With Epilepsy* (Fifth Edition) (1985).

[16]Finesilver, *supra,* note 15 at 57; *see e.g.* Wash. Rev. Code §26.04.230 (1951) [fine up to $1,000 and imprisonment for a person who marries knowing he has epilepsy].

These marriage statutes were originally enacted on the presumption that epilepsy was hereditary, progressively degenerating, and basically incurable. It was also believed that persons with epilepsy were less intelligent than the general population, and hence, prohibiting marriage and procreation was a method of social control over this feared condition.[17] The last of the laws interfering with the right of persons with epilepsy to marry was not repealed until 1982.[18]

Epilepsy was also one of the conditions that eugenic sterilization laws were designed to control. The enactment of these statutes was the result of a general movement advocating sterilization of the habitual criminal, the mentally ill, and the feebleminded as a means of eliminating "detrimental elements" from society.[19] As of 1955, seventeen states still had involuntary sterilization laws which were specifically applicable to persons with epilepsy.[20] Today, one of these statutes still exists in limited form in the United States.[21]

[17]Fabing & Barrow, *Epilepsy & The Law* 5 (1956).

[18]In 1982, Missouri repealed its statute making it a crime for someone to solemnize a marriage if that person knew that one of the parties had epilepsy. *See* Mo. Rev. Stat. §451.115 (Vernon 1986 Supp.), amended by L. 1982, p. 626 §1.

[19]*Commission's Report, supra,* Volume I at 117.

[20]Fabing & Barrow, *Epilepsy and The Law* 29 (1956).

[21]Delaware still provides for the involuntary sterilization of persons with epilepsy in certain situations. *See,* Del. Code Ann. tit. 16 §57-01 *et seq.*, as amended, (1983).

2. Modern Employer Attitudes Toward Hiring Persons With Epilepsy Continue to Reflect Misunderstanding and Fear of the Condition.

Perhaps the most dramatic social consequence to the individual of having a diagnosis of a seizure disorder is its effect on obtaining and maintaining employment. Unfortunately, all too often persons with epilepsy are denied employment or not trained for work they could do well and safely, because of an unreasoned fear of their seizures. The working community has not welcomed persons with epilepsy with open arms.

In 1948, the U.S. Department of Labor reported that epilepsy was the most difficult handicap to overcome in obtaining employment, as exclusionary policies were common.[22] In 1960, a study conducted by the same department reported that epilepsy was the condition which employers were least willing to accept in their employees.[23] This was despite effectiveness studies that continued to demonstrate that the efficiency of the handicapped worker was as great as or exceeded that of the "normal" worker.[24]

The number of unemployed persons with epilepsy (among those fully able to work) remains disproportionately high. The Congressionally established Commission

[22]Epilepsy Foundation of America, *New Directions in Epilepsy Rehabilitation: A Resource Manual.* (1979) at i.

[23]*Id.*

[24]*See* e.g., Udel, *The Work Performance of Epileptics in Industry,* Arch. Environmental Health 1, September, 1960. Later studies produced the same conclusions. For example, a 1982 report from Dupont concluded that, "Dupont studies over a period of twenty-five years have shown that the performance of handicapped employees is equivalent to that of their non-impaired co-workers. In safety, job duties and attendance, the handicapped hold their own." E.I. du Pont de Nemours and Co., *Equal to the Task* 4 (1982).

for the Control of Epilepsy and Its Consequences[25] reported that the unemployment rate of this population is two to three times the national-average. The underemployment rate, (i.e., persons employed in positions below their level of skill) remains even higher.[26] In reviewing the many factors that might contribute to these high rates, the Commission identified employer attitudes toward hiring persons with epilepsy as a major barrier to achieving employment. Others have agreed with this view.

> "Undoubtedly, the biggest obstacle to the rehabilitation of persons with epilepsy is employer resistance to hiring them. Furthermore, the emotional roots of this resistance aren't easily altered by logic or intelligent reasoning.[27]

A study by Sands and Zalkind which sought to explore the effects of an educational campaign on changing employer attitudes found that:

[25]The Commission on Control of Epilepsy and its Consequences was established by Congress to make a comprehensive study of the medical and social management of epilepsy, to investigate and make recommendations concerning the proper roles of Federal and State governments and national and local public and private agencies in research, prevention, identification or treatment and rehabilitation of persons with epilepsy, and to develop a comprehensive national plan for the control of epilepsy and its consequences. P.L. 94-63 §604(b) (1975).

[26]*Commission Report,* Vol. I at 85. In addition, a 1980 study of unemployment rates among men with epilepsy concluded that unemployment in the adult male population exceeded the rate in the general population by 12 percent and that these figures substantially "underestimated the magnitude of the problem." Emlen and Ryan, Analyzing Unemployment Rates Among Men With Epilepsy, Unpublished paper presented at the 30th Western Institute on Epilepsy, Portland, Oregon, March, 1979.

[27]Benson, *Epilepsy and Employment: Placement Problems and Techniques,* 3 American Rehabilitation 3 (March/April 1978).

> [e]ven though employers view favorably the epileptics who work for them, they do not yet generalize these positive feelings into hiring behavior and practices. Their feelings toward hiring – that is, not to employ more epileptic workers – remain steadfast. Furthermore, their denial that unemployment among epileptics is due to employer attitudes makes them almost impervious to conventional education techniques.[28]

Numerous studies have been conducted demonstrating the employer's attitudinal barrier to hiring persons with epilepsy in many industries.[29] These studies reflect the conditions that Section 504 was intended to ameliorate. For example:

In 1974, a survey of seven (7) industries, all employing more than 200 workers, was conducted by the Federation of Jewish Philanthropies. Personnel directors admitted they fired persons with epilepsy upon discovery of the condition despite attempts by co-workers to hide the epilepsy. Six of the seven companies excluded persons with epilepsy to a greater extent than they did orthopedically disabled, the visually impaired, those with cerebral palsy, and cardiac patients.[30]

A longitudinal study was conducted in the Midwest between 1962 and 1973. Nearly 1,400 employers were questioned regarding their views on three disability categories, one of which was epilepsy. Questions centered on work

[28]Sands and Zalkind, *Effects of An Educational Campaign to Change Employee Attitudes Toward Hiring Epileptics,* 13 Epilepsia 87 (1972) at 94-95.

[29]These studies as well as others, are reviewed in greater detail in the *Commission Report, supra,* note 28, Volume II at 493-497.

[30]J. Gorman, *Epilepsy: Current Communications Problem Areas,* in MODERN DIMENSIONS IN EPILEPSY (L. Perlman ed. 1974).

tolerance, reliability, need for extra supervision, absenteeism, co-worker relationships, ability to adjust to a new work environment, and tolerance of job pressure. After ten years, 124 employers were recontacted. Although persons with epilepsy gained considerably in favor compared to those with the other handicaps, employers who knowingly hired people with seizure disorders rose from a mere 5 percent in 1962 to only 12 percent in 1973.[31]

A 1984 study comparing employer attitudes toward persons with eight different handicaps suggested that attitudes of employers toward persons with epilepsy are begining to improve.[32] However, the authors stated that some improvement in attitudes does not mean that employment discrimination against persons with handicaps has disappeared.

B. Congress Recognized That Fears and Misperceptions About A Handicap Often Present A Greater Barrier to Employment Than the Handicap Itself.

The legislative history of the Rehabilitation Act clearly demonstrates that Congress intended Section 504 to cover adverse decisions which are based on stereotyped beliefs and fears about a person's handicaps and not, as the DOJ argues, just those situations in which an employer feels a person cannot do the job because his handicap impairs his actual abilities to perform the work in question.

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[31]Hartlage, *Ten Years of Employer Attitudes*, National Spokesman at 7 (September 1974).

[32]Fuqua, Rathbun, & Gade, *A Comparison of Employer Attitudes Toward the Worker Problems of Eight Types of Disabled Workers*, 15 Journal of Applied Rehabilitation Counseling 40 (1984).

Title V of the Rehabilitation Act established as a national policy the protection of the civil rights of handicapped people, and was based on the doctrine that handicapped people have a "basic human right to full participation in life and society."[33]

Briefly, the legislation was designed to promote equal employment opportunities in both the public and private sector.[34] Section 501 of Title V requires all Federal departments, agencies and instrumentalities to have affirmative action plans (updated annually) providing adequate hiring, placement and advancement opportunities for the handicapped.[35] Section 503 mandates affirmative action for federal contractors and subcontractors and provides an administrative enforcement mechanism.[36] Section 504 ensures that programs and activities receiving federal financial assistance will not discriminate against otherwise qualified handicapped persons; it is explicitly applicable to all executive and federal agencies.[37]

In enacting these measures, Congress recognized the barriers that exist to the integration of the handicapped into the mainstream of American society. Congress took substantial evidence and expressly recognized that employer attitudes and fears were largely responsible for the

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[33]S. Rep. No. 1297, 93d Cong., 2d Sess. 56, *reprinted in* (1974) U.S. Code Cong. and Ad. News 6373, 6406. For a thorough review of the civil rights issues of handicapped persons in America, see the U.S. Commission on Civil Rights report, *Accommodating the Spectrum of Individual Abilities*, Clearinghouse Publication 81, September 1983.

[34]29 U.S.C. §701(8).

[35]29 U.S.C. §791(b).

[36]29 U.S.C. §§793(a) & 793(b).

[37]29 U.S.C. §794, as amended by P.L. 95-602.

exclusion of the handicapped from employment.[38] In the Senate Report accompanying the 1974 amendments to the Rehabilitation Act the Senate Committee on Labor and Public Welfare noted that:

> Individuals with handicaps are all too often excluded from school and educational programs, barred from employment or are under-employed because of archaic attitudes and laws, . . .[39]

In the early 1970s, in explaining the need for passage of the Act, Congressman Vanik recounted a court ruling which excluded a child with cerebral palsy from school because his teacher claimed his physical appearance "produced a nauseating effect on his classmates." 117 Cong. Rec. 45974 (Dec. 9, 1971) (remarks of Rep. Vanik). Similarly, Senator Mondale described a story about a woman who was "crippled by arthritis" and who was denied a job because the "college trustees didn't like the idea of her working as a clerk at the college because normal students shouldn't see her." 118 Cong. Rec. 36761 (Oct. 17, 1982).[40]

In *Mantolete v. Bolger,* 767 F.2d 1416 (9th Cir. 1985) the court reviewed the legislative history of the Rehabilitation Act, stating that Congress enacted the statute "to prevent employers from refusing to give much needed opportunities to handicapped individuals on the basis of misinformed stereotypes." 767 F.2d at 1422.

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[38]S. Rep. No. 93-318, 93d Cong., 1st Sess. 4, *reprinted in* (1973) U.S. Code Cong. and Ad. News 2078.

[39]S. Rep. 93-1297, 93d Cong., 2d Sess. 32, *reprinted in* (1974) U.S. Code Cong. and Ad. News 6373, 6400.

[40]There are numerous other examples of Congress' concerns contained in the discussion of the legislative history of the Act contained in The Congressional Brief.

C. The Rehabilitation Act Contains A Framework for Ensuring that Employment Decisions Are Not Based on Irrational Fears and Prejudice by Requiring an Individualized Assessment of the Handicapped Person's Ability to Perform the Job in Question.

To avoid employment decisions based on myths and fears about handicaps, the Rehabilitation Act sets up a very specific framework for employer decision-making. The question presented by the statute is whether the handicapped person is "otherwise qualified" to perform the job. 29 U.S.C. §794. Federal regulations further refine this question by defining "qualified handicapped individual" as follows:

> Qualified handicapped person means . . . with respect to employment, a handicapped person, who with or without reasonable accommodation, can perform the essential functions of the job in question without endangering the health and safety of the individual or others. 29 C.F.R. §1613.702(f).

The determination of whether someone can perform these essential functions without endangering himself or others, however, requires an individualized assessment of the objective medical facts surrounding the person's condition. Such decisions may not be based on stereotype or on the subjective beliefs of the employer. *Mantolete v. Bolger, supra* at 1423.

This analysis requires a matching of the requirements of the job with the individual's specific qualifications and does not allow for broad generalizations about all persons with a particular disability. Thus, this approach is directly contrary to the suggestion in this Court's second Certiorari question that freedom from tuberculosis could be a bona

fide occupational qualification defense (bfoq) under the Rehabilitation Act. Unlike many state discrimination statutes and the other federal civil rights statutes, Section 504 and its regulations do not provide for bfoq defenses.[41] This is deliberate. One of the problems inherent in a bona fide occupational qualification defense in the handicap area is the fact that such an analysis tends to reinforce the very stereotypes the Rehabilitation Act was designed to erase – e.g., persons with epilepsy are unable to work, or persons with tuberculosis are always contagious. By tying the test of who is "otherwise qualified" to factual questions about individual ability, decisions based on stereotype can be avoided.[42]

The Rehabilitation Act does not require an employer to hire a person whose condition poses a reasonable probability of harm to themselves or the public. *Mantolete v. Bolger,* 767 F.2d 1416, 1422 (9th Cir. 1985). Congress understood that fears about safety may be legitimate under certain circumstances but that at other times, fears about safety may be as irrational and baseless as fears about other aspects of a person's handicap. *See* discussion of legislative history contained in the Congressional Brief, Section I.B.2.

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[41]The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, provides for a bfoq defense, as does Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.* A number of state employment discrimination statutes also provide for the defense. *See, e.g.,* NEB. REV. STAT. §48-1108 (Reissue 1984); WASH. REV. CODE §49-60.180(1) (West, 1986 pp). CONN. GEN. STAT. ANN. §46a-60(a) (West 1986 Supp.).

[42]As the AMA brief clearly explains, tuberculosis is not a uniform condition which renders all persons exposed to it infectious, even for short periods of time. AMA Brief at 5-6. Thus it is inappropriate to make employment decisions about persons with tuberculosis without looking at the individual's medical condition based on a detailed analysis of her medical records.

The Court below understood Congress' concern that safety considerations be analyzed by an examination of the manifestations of the individual's particular handicap when it remanded this case for factual findings concerning respondent's medical condition. This remand was appropriate and should be affirmed by this Court.

CONCLUSION

The Rehabilitation Act is a remedial statute deliberately designed not only to protect persons with handicaps from discrimination based on their condition but also based on fear and prejudice about their condition. In enacting the statute, Congress also understood that it was inappropriate to base employment decisions about persons with handicaps on broad generalizations about the particular condition. Thus, it set up a framework which required that the individual's particular qualifications be established in light of his work and medical history. This framework is appropriate for resolution of the issues in this case. This Court should therefore uphold the Court of Appeals decision remanding this case for a factual determination of whether respondent was otherwise qualified to perform the essential functions of the job in question.

Respectfully submitted,

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In the Supreme Court

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OCTOBER TERM, 1986

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, et al.,
Petitioners,

v.

GENE H. ARLINE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE EMPLOYMENT LAW CENTER, NATIONAL GAY RIGHTS ADVOCATES, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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HOPP

QUESTIONS PRESENTED

1. Whether tuberculosis, like other impairments which substantially limit major life activities, constitutes a "handicap" within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

2. Whether an individual who has tuberculosis is automatically precluded from being "otherwise qualified" for a teaching job, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, without any consideration of how that individual might have been accommodated.

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INTEREST OF AMICI

Amici are legal rights and professional organizations interested in the protection and furtherance of the rights of disabled individuals, including those who have infectious diseases and those perceived to have infectious diseases.

The Employment Law Center is a project of the Legal Aid Society of San Francisco. For many years the Center has pursued the rights of disabled individuals, including persons with cancer, epilepsy, back problems, vision problems, and, more recently, Acquired Immune Deficiency Syndrome ("AIDS"). These concerns have been the focus of many of the Center's projects, including the Disability Employment Rights Project, the Medical

Standards Project, the Disability and Employment Advocacy Project and the AIDS and Employment Project. The Center also sponsors two projects funded by the California and National American Cancer Societies: the Cancer Employment Law Education Law Education Project and the National Cancer Employment Law Project.

National Gay Rights Advocates ("NGRA") is a public interest legal organization dedicated to the protection and furtherance of the civil rights of gay men and lesbians. NGRA currently represents a number of people with AIDS in employment discrimination litigation.

Bay Area Lawyers for Individual Freedom ("BALIF") is a professional organization of over 400 gay and lesbian attorneys who practice law in Northern California. In the past three years, BALIF members have provided hundreds of hours of *pro bono* legal services to people with AIDS.

Lambda Legal Defense and Education Fund, Inc. ("LAMBDA") is a national public-interest organization which engages in test case litigation and educational programs on issues concerning the rights of lesbians and gay men. Because of the tremendous impact of the AIDS crisis on the gay community, LAMBDA has litigated several test cases involving AIDS-related issues. Lambda has also been involved in litigation concerning the applicability of handicap discrimination laws to AIDS since the issue first arose.

SUMMARY OF ARGUMENT

This action arises under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1985), which prohibits discrimination against any "otherwise qualified handicapped individual" in any federally-assisted program or activity, or in any program conducted by the federal government. Section 504 was adopted to protect disabled individuals[1] from the irrational prejudice they

[1] Throughout this brief we use the terms "disabled" and "handicapped" interchangeably. Both are meant to include persons protected by Section 504 because they have impairments which substantially limit major life activities. The disabled community prefers the term "disabled."

often face. The materials submitted by the Petitioners and the United States Department of Justice, however, appeal to the same irrational prejudice that Section 504 is designed to combat.

The Court's Writ of Certiorari is limited to two narrowly-drawn questions: 1) whether tuberculosis constitutes a handicap within the meaning of Section 504; and 2) whether a person with that disease is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of the statute. The Petitioners and the Department of Justice go beyond these questions to discuss imagined consequences of protecting a variety of individuals with different diseases from discrimination. Petitioners have lodged with the Court a recent Department of Justice memorandum entitled "Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus," (June 20, 1986)[2] in an attempt to exploit the public hysteria surrounding the AIDS epidemic. Petitioners raise the issue of AIDS even though this case involves only the very different illness of tuberculosis. Petitioners apparently hope to create an unwarranted fear for public safety to prompt the Court into ruling on issues which are not before it. Yet Petitioners do not advise the Court of the most important fact about AIDS: it cannot be transmitted in the workplace.[3]

[2] Hereinafter the "DOJ Opinion."

[3] It is now generally understood that although AIDS is an infectious disease, the AIDS virus is spread only by the transfer of body fluids, principally semen and blood through sexual contact, blood transfusions, sharing needles, or from mother to child in the womb. *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy—Associated Virus in the Workplace*, 34 Morbidity and Mortality Weekly Report 681 (The Centers for Disease Control, November 15, 1985). For a concise description of the epidemiology of AIDS, *see* Burris, *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE L. & POL. REV. 479, 504-08 (1985); Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 684-89 (1985).

Petitioners attempt to convince the Court to adopt a bright-line rule that *no* infectious disease[4] is a "handicap," within the meaning of Section 504. Petitioners and the Department of Justice acknowledge that the physical and mental impairments of a disease may be handicaps. However, a disease cannot be separated from its inherent effects. Petitioners' argument disregards the very language and history of the Rehabilitation Act of 1973. The definition of "handicapped individual" clearly includes a person with an infectious disease.

Petitioners and the Department of Justice also argue that Section 504 does not protect individuals with infectious diseases from employment discrimination where the employer believes that the individual's disease may be communicated to others in the workplace—*even if the employer has no basis in fact for its belief*. Creating such an exception to Section 504 would enable any grantee[5] to defend discrimination against disabled persons by resort to the very stereotypes about disabled persons Section 504 was designed to combat. Unfounded notions about an individual's fitness for a particular position are not accepted as defenses to any other type of action for discrimination. The Court should not make an exception in this case.

A person whose employer can prove that he has a disease which is communicable to others in the workplace, and for whom no "reasonable accommodation" can be made, is excluded from protection under Section 504. The purpose of Section 504—to protect disabled individuals from irrational prejudice and stigma—is served only by case-by-case consideration of the danger that a particular handicapped person will spread a particular illness in a particular environment.

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[4] An "infectious disease" is simply a disease caused by an infectious agent, such as a virus or bacteria. TABER'S CYCLOPEDIC MEDICAL DICTIONARY at 725 (14th ed. 1981). The classification of a disease as "infectious" does not indicate whether or to what extent the disease is contagious. *Id. See also* Brief of the State of California as *Amicus Curiae* Supporting Respondent at Section I. A.

[5] As used in this brief, the term "grantee" includes employers and all other recipients of federal funds who are subject to Section 504.

ARGUMENT

I.

INFECTIOUS DISEASES CAN BE "HANDICAPS" WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. § 794

A. The Court of Appeals Correctly Ruled that Tuberculosis Falls Neatly Within the Statutory Scheme

The question in this case is whether Section 504 applies to individuals suffering from infectious diseases. Respondent was discharged as an elementary school teacher by Petitioner when she suffered three relapses of tuberculosis in a 17-month period. The District Court held that contagious diseases were not handicaps under Section 504. (Petitioners' Appendix C. at 14). The Court of Appeals reversed, holding that "persons with contagious diseases are within the coverage of Section 504," *Arline v. School Board of Nassau County*, 712 F.2d 759, 764 (11th Cir. 1985), and remanded the case to develop a factual record to determine whether Respondent was "otherwise qualified" under Section 504.[6] Petitioners and the Department of Justice seek to reinstate the District Court's ruling.[7]

The language of Section 504 and its accompanying regulations outline a broad prohibition of discrimination against the handicapped. Section 504 reads, in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

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[6] The poor development of the factual record regarding the nature of Respondent's tuberculosis and the steps that could have been taken to accommodate her make any final decision by the Supreme Court impossible. *Amici* believe that certiorari was improvidently granted in this case.

[7] *See* Petitioners' Brief at 26-28 and Brief of the United States as *Amicus Curiae* Supporting Petitioners at 10-23. Both would implement a subjective "fear of contagion" exception that would eviscerate Section 504's protection of disabled persons who have diseases.

> under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794. For the purposes of Section 504, a "handicapped individual" is defined as:

> Any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(7)(B). Regulations promulgated by the Department of Health and Human Services ("DHHS") provide detail to the statutory definition. A "physical or mental impairment" is:

> (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i)(1985). "Major life activities" are "functions such as taking care of one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. § 84.3(j)(2)(ii)(1985).[8]

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[8] The Supreme Court has noted that Section 504 authorizes executive agencies to promulgate regulations prohibiting discrimination against the handicapped. *Bowen v. American Hospital Ass'n*, 106 S. Ct. 2101, 2120 (1986). Thus, the Court has recognized the DHHS regulations, codified at 45 C.F.R. Part 84, as "an important source of guidance on the meaning of § 504." *Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712, 722 n.24 (1985) (finding that the 1974 amendments to Section 504 provided executive agencies with "substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination"). Consequently, these regulations are entitled to judicial deference. *Nelson v. Thornburgh*, 567 F. Supp. 369, 379 (E.D. Pa. 1983), *aff'd mem.*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 955 (1985) (DHHS regulations interpreting Section 504 entitled to deference "if consistent with the purposes of the statute."). *See also Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (DHHS regulations entitled to deference). They are certainly entitled to greater deference than is WEBSTER'S THIRD INTERNATIONAL DICTIONARY, selected by the Department of Justice as the source for its definition of "impairment." *See* Brief of the United States as *Amicus Curiae* Supporting Petitioners at 15 n.12.

As the Court of Appeals ruled below, a person suffering from tuberculosis fits "neatly" into this statutory framework. *Arline*, 772 F.2d at 764. (Pet. App. A at 8). Tuberculosis constitutes a physical impairment within Section 504 since it affects the lymphatic and respiratory systems. Joint Appendix ("J.A.") at 7; Brief of the American Medical Association as *Amicus Curiae* Supporting Petitioners at 4-8. Further, as Respondent's personal history reveals, tuberculosis substantially limits "major life activities," such as breathing and working, at some point. Although Respondent is apparently not currently suffering the debilitating physical effects of tuberculosis (*see* J.A. at 20, 31), she is still "handicapped."[9]

Petitioners argue that even if an infectious disease is a handicapping condition, discrimination against a person with a disease does not constitute discrimination against a "handicapped individual" if that discrimination is motivated by a fear (whether or not medically justified) that the victim is contagious. This argument is more bluntly asserted in the brief submitted by the United States Department of Justice as *Amicus Curiae* Supporting Petitioners at 10-23.[10] The Court should reject the Petitioners'

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[9] Even though she has been in remission for more than five years, Respondent still has tuberculosis. Others whose diseases (such as cancer) are cured may also be handicapped because they may have a record of or regarded as having a disease. *See* 45 C.F.R. § 84.3(j)(2)(iii) and (iv) (1985).

[10] The Department of Justice's argument concludes that "[S]ection 504 simply does not reach decisions based on fear of conta-

invitation to create a common-law "fear of contagion" exception to the scope of Section 504.

The flaw in the Petitioners' and Department of Justice's reasoning is in separating the effects of a disease from the disease itself. Such a distinction is inconsistent with the legislative history of Section 504.[11] Moreover, the Department of Justice's reasoning, if applied to all handicaps, would allow discrimination based upon irrational stereotypes about handicapped persons because such stereotypes may concern matters other than the physical or mental effects of a particular handicap. For example, an employer who honestly (but irrationally) believes that individuals suffering from diabetes, cancer or glaucoma are contagious would be free to discriminate against individuals with these conditions.[12] Such

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gion—*whether reasonable or not*—so long as it is not in truth a pretext for discrimination on account of handicap." DOJ Opinion at 34 (emphasis added).

[11] In the Senate Report accompanying the bill which adopted the current definition, diseases such as cancer—*and not merely their effects*—are noted as examples of "handicapping conditions." S. REP. NO. 1297, 93d Cong., 2d Sess, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6389. This view of handicaps was detailed in the implementing regulations, where an illustrative list of diseases *constituting* physical impairments under Section 504 was provided. 45 C.F.R. Part 84, App. A, at 310.

[12] Indeed, one commentator demonstrated the weakness of Petitioners' and the Justice Department's analysis by applying it to actions arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e to 2000e-17 (1981). Moore, *An Invitation to Senseless AIDS Bias*, L.A. Times, June 29, 1986, Part V, at 5, col. 4-6. Applied to an action alleging racial discrimination in hiring, the analysis would require a court to distinguish between discrimination on the basis of a job applicant's race *per se* and discrimination on the basis of what the employer believes are the characteristics of the applicant's racial group. Discrimination against an applicant simply because he or she is black would remain illegal. If, however, an employer irrationally believes blacks to be inherently "lazy" and refuses to hire a black applicant on account of his or her assumed "laziness," rather than on account of his or her skin color, the employer would be in compliance with the law. Such a result would, of course, frustrate the very purpose of Title VII.

licensed discrimination on the basis of irrational stereotypes would defeat the purpose of Section 504.[13] *See Strathie v. Department of Transportation*, 716 F.2d 227, 231 (3d Cir. 1983) (Section 504 protects handicapped individuals from employment discrimination based on irrational prejudice and stigmatizing stereotypes.)

While a court must evaluate the effects of a disease to determine if it is a physical impairment which substantially limits a major life activity, or is regarded as such, once that evaluation is made, the disease itself can be classified as a handicap. Discrimination against a person who is (or is perceived to be) contagious is discrimination based solely upon the disease and therefore solely upon the handicap.

The Department of Justice also argues that an individual with an infectious disease is not "handicapped" within the meaning of Section 504 unless the disease causes "an inability to perform certain physical or mental functions." *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, at 16 n.14. This argument is contrary to the express language of Section 504. It would exclude from the scope of Section 504 an individual who has a history of a handicap or who is regarded as having a handicap. Such an individual is clearly protected by Section 504. 29 U.S.C. § 706(7)(B) (1985).

Moreover, societal aversion to a disability may alone make it a handicap. For example, the Department of Health and Human Services has found that a "cosmetic disfigurement" may be a handicap. 45 C.F.R. § 84.3(j)(2)(i).[14] Although this type of

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[13] Discrimination based upon fear of contagion, aversion to death, and fear of increased insurance costs are the most common problems cancer patients face. McKenna, *Employment and Insurance Issues for the Cancer Patient*, Proceedings of the Fourth National Conference on Cancer and Nursing at 36-38 (1984); *see also* Canellos, *Ill-Founded Notions: Job Discrimination Against Cancer Patients*, The Boston Phoenix, January 15, 1985, at 1.

[14] Another example is Hansen's Disease (leprosy). With treatment, this disease often does not interfere with a person's physical or mental functioning. Nor is it easily transmitted. TABER'S CYCLOPEDIC MEDI-

disability may have no direct physical or mental effect on an individual, irrational societal stereotypes may substantially limit his work opportunities or other major life activities.[15] Finally, the cases cited by the Department of Justice to support its strained reading of Section 504 either are inapposite or support our analysis of that section.[16]

CAL DICTIONARY, at 808 (14th ed. 1981). Nevertheless, individuals with Hansen's Disease are often shunned because of misconceptions about the disease.

[15] The Rehabilitation Act was expressly designed to combat such reactions to a person's condition. Congressman Vanik, in explaining the need for the Act, told of a court ruling excluding a cerebral palsied child from school even though he had no physical problems "because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates." 117 CONG. REC. 45974 (1971) (remarks of Rep. Vanik). Similarly, Senator Humphrey spoke of a desire to prevent discrimination against individuals regarded as "different" or "disturbing." 118 CONG. REC. 525 (1972) (remarks of Sen. Humphrey). Serious burn victims are another example. Congress clearly intended to combat discrimination resulting from aversion to the disabled as well as discrimination based on physical or mental disabilities. *See* text accompanying footnotes 21 and 22, *infra*.

[16] *See de la Torres v. Bolger*, 781 F.2d 1134 (5th Cir. 1986) (left-handedness not a job-related impairment; plaintiff dismissed because of poor performance); *Jasany v. U.S. Postal Service*, 755 F.2d 1244, 1250 (6th Cir. 1985) (person with eye impairment not considered handicapped where he was unable to perform only one job using a certain type of machine); *Tudyman v. United Air Lines*, 608 F.Supp. 739 (C.D. Cal. 1984) (individual's exceptionally muscular build causing him to exceed defendant's weight limit was not a handicap because it disqualified plaintiff from only one particular job); *Oesterling v. Walters*, 760 F.2d 859, 861 (8th Cir. 1985) (varicose veins held not to be a handicap because they did not "substantially limit . . . major life activities"). These cases hold only that conditions which do not substantially impair an individual's major life activities are not handicaps. None of the authorities cited by the Department of Justice suggest that working is not a major life activity or that individuals who do not currently suffer a physical or mental disability are necessarily not handicapped. In arguing that the definition of "handicapped individual be limited to persons whose ability to perform a physical or mental task" is impaired, the

B. Congress Enacted the Rehabilitation Act With a Strong Remedial Purpose and Intended It To Be Broadly Construed and Applied

Section 504 is specifically designed to include unforeseen handicaps. "The definition [of 'handicapped individual'] does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list." 45 C.F.R. Part 84, App. A., at 310. Thus, contrary to Petitioners' suggestion, Petitioners' Brief at 23-25, Congress' failure to explicitly *list* tuberculosis or other infectious diseases indicates that Congress intended to create a broader definition of handicap by *describing* handicapping conditions rather than listing them.[17] In fact, Congress explicitly intended to include within Section 504 individuals who had recovered—in whole or in part—from medical disorders.[18] Section 504 was also meant to combat discrimination against disabled persons stemming from ignorance and indifference as well as malice.[19]

The Supreme Court has read Section 504 broadly to give effect to its purpose. In *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), the Court held that Section 504 applied to all programs receiving federal aid and not just to employment-related

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Department of Justice is seeking to return to the employability criterion which Congress explicitly rejected. *See* text accompanying footnotes 21 and 22, *infra*.

[17] Even the Department of Justice acknowledges that "courts have generally construed the term ['handicapped'] quite broadly." DOJ Opinion at 18.

[18] *See* authority cited in footnote 11, *supra*.

[19] The Department of Justice attempts to turn this broad intent on its head, implying that Congress' concentration on indifferent discrimination indicates that it was tolerant of intentional discrimination. Brief for the United States as *Amicus Curiae*, at 8-9. As the Supreme Court noted in *Alexander*, however, Congress' attention to thoughtless discrimination merely indicated a receptivity to disparate impact claims, without in any way diminishing Section 504's prohibition of denials based on discriminatory animus. 105 S. Ct. at 716-17.

programs.[20] The Supreme Court has also held that Section 504 requires grantees to provide "meaningful access" to program benefits, *Alexander*, 105 S. Ct. at 721, and "reasonable" modifications to existing programs. *Southeastern Community College v. Davis*, 442 U.S. at 412-13.

The amendments to the Rehabilitation Act also evidence an intent of broad coverage. As originally enacted in 1973, the statute focused its definition of handicap almost exclusively on employability. "Handicapped individual" included only an individual "who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment *and* (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services. . . ." Rehabilitation Act of 1973, Pub. L. 93-112, § 7(6), 87 Stat. 355, 361 (emphasis added).

Realizing that a definition of handicap based upon employability was inadequate, Congress amended the Act in 1974 to include all handicaps which "substantially limit[ ] . . . major life activities . . ." Rehabilitation Act Amendments of 1974, Pub. L. 93-516, § 111(a), 88 Stat. 1617, 1619. The amendment was intended "to include within Section 504 individuals who may have been unintentionally excluded from its protection by the original definition of handicapped individuals which over-emphasized employability." *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1285 n.25 (7th Cir. 1977).[21] Indeed, Congress noted that employability was "irrelevant to the many forms of potential discrimination covered by Section 504." S. REP. NO. 1297, 1974 U.S. CODE CONG. & AD. NEWS at 6388. That Congress rejected a narrow definition of "handicapped individual"

[20] Section 504 therefore covers all participants—both teachers and pupils—in an educational program receiving federal financial assistance. *E.g., Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981) (applying Section 504 to admission policies at a medical school). Both Section 504 and state health laws take public safety into account.

[21] *See* detailed discussions of the legislative history in the briefs of members of Congress as *amici curiae* supporting respondent.

in favor of a much broader definition demonstrates its broad remedial goals.[22]

In 1978, Congress reaffirmed its broad view of Section 504 with further amendments. It added a new section to the Rehabilitation Act, now codified at 29 U.S.C. § 794a, which confirmed its intention to create a private right of action for violations of the Rehabilitation Act anti-discrimination provisions. Rehabilitation, Comprehensive Services, and Development Disabilities Amendments of 1978, Pub. L. 95-602, Title I, § 120(a), 92 Stat. 2995, 2982. *See Prewitt v. United States Postal Service*, 662 F.2d 292, 302-03 (5th Cir. 1981) (discussing the private right of action following the 1978 amendments).[23]

[22] The Supreme Court has acknowledged the importance of the 1974 amendments:

> While these [1974] amendments and their history cannot substitute for a clear expression of legislative intent at the time of enactment, as virtually contemporaneous and more specific elaborations of the general norm that Congress had enacted into law the previous year, the amendments and their history do shed significant light on the intent with which § 504 was enacted.

Alexander, 105 S.Ct. at 724 n.27 (citations omitted).

[23] Lower courts have followed Congress' intent by applying Section 504 to a wide variety of medical conditions. *E.g., Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983) (heart condition including coronary by-pass and use of pacemaker); *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402 (5th Cir. 1983) (anxiety, depression and insomnia); *Bentivegna v. U.S. Dep't. of Labor*, 694 F.2d 619 (9th Cir. 1982) (diabetes mellitus); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981) (multiple sclerosis); *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809 (E.D. Pa. 1977) (epilepsy); *Kling v. County of Los Angeles*, 769 F.2d 532 (9th Cir.), *rev'd on other grounds*, 88 L. Ed. 2d 277 (1985) (Krohn's disease: a bowel disorder resulting in loss of weight, nausea, vomiting, headaches and abdominal pain). When courts have found that conditions are not statutory "handicaps," it is invariably because they do not substantially impair a major life activity.

Where Congress wished to exclude specific conditions from Section 504 protection, it did so explicitly. In 1978, Congress amended the Rehabilitation Act to remove individuals:

> whose current use of alcohol or drugs prevents [them] from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Pub. L. 95-602, § 122(a)(1), 92 Stat. at 2984-2985.[24] Congress' failure to specifically exclude infectious diseases leaves them within the scope of Section 504.

C. States With Physical Handicap Laws Analogous to Section 504 Have Interpreted Those Laws to Apply to AIDS

All states, and the District of Columbia, currently have laws or executive orders which prohibit discrimination on the basis of handicap.[25] Leonard, *Employment Discrimination Against Persons With AIDS*, 10 U. DAYTON L. REV. 681, 690 (1985). Though the definitional language varies among the states, the most common terminology is borrowed from the federal Act: a "handicapped individual" is one who "has a physical or mental impairment which substantially limits one or more of such per-

[24] Recovered alcoholics, and current alcoholics who perform their jobs adequately, are still fully protected. *See, e.g., Tinch v. Walters*, 765 F.2d 599 (6th Cir. 1985) (striking down Veterans Administration regulations which discriminated against alcoholics); *McKelvey v. Walters*, 596 F. Supp. 1317 (D.D.C. 1984) (same).

[25] Most state laws pertaining to handicap discrimination are collected in LAB. REL. REP. (BNA), 8A FAIR EMPL. PRAC. MANUAL, and in 3 EMPL. PRAC. GUIDE (CCH). Forty-two of these states, and the District of Columbia, have laws which govern both private and public sector discrimination; five other states protect only public employees. Leonard, 10 U. DAYTON L. REV. at 690 n.36. In addition, two recently passed laws and one executive order block handicap discrimination. *See* Ariz. Rev. Stat. Ann. §§ 41-1461 to 41-1463 (West 1985) (public and private sectors); Delaware Gubernatorial Order discussed in Philadelphia Gay News, January 3-9, 1986 (public sector); Wyo. Stat. 16-3-101 to 16-3-115; §§ 27-9-101 to 27-9-108 (1985) (public and private sectors).

son's major life activities."[26] *Id.* at 691. Some other states provide different, but equally wide-ranging definitions, *id.* at 692-95 (concluding that AIDS would textually qualify under most state statutes); five states provide no statutory definition for "handicap." *Id.* at 692 n.48.

Only two states explicitly exclude "communicable diseases" from their definition of "handicap." Ga. Code Ann. § 34-6a-3(b) (1982); Ky. Rev. Stat. Ann. § 207.140(2)(c) (Baldwin 1981). The implication of these exclusions is clear: absent explicit legislative intent, the definition of "handicap" encompasses communicable diseases such as AIDS.[27] Indeed, enforcement and human rights agencies in at least thirty-one jurisdictions have concluded that communicable diseases are protected handicaps under state law or are willing to accept AIDS complaints.[28]

In at least three states decisions have been rendered protecting persons with AIDS. In *People v. 49 West 12 Tenants Corp.*, No. 43604/83 (N.Y. Sup. Ct. Oct. 7, 1983), the New York State

[26] Thirteen jurisdictions use this language. Colo. Rev. Stat. § 24-34-301 (1982) (does not include mental handicaps); Ga. Code Ann. § 45-19-22(3) (1982); La. Rev. Stat. Ann. § 46-2253(1)(West 1982); Mass. Gen. Laws Ann. ch. 151B, ¶ 1 (West Supp. 1985); Minn. Stat. Ann. § 363.01(25) (West Supp. 1984); N.M. Stat. Ann. § 28-1-2(K) (1978); Okla. Stat. Ann. tit. 25, § 1301(4) (West Supp. 1984-1985); Or. Rev. Stat. § 659.400(2) (1983); R.I. Gen. Laws § 8-5-6(H) (Supp. 1984); Utah Code Ann. § 34-25-2(14) (Supp. 1983); Vt. Stat. Ann. tit. 21, § 495d(5) (Supp. 1984); W.Va. Code § 5-11-3(t) (Supp. 1984); 16 Pa. Admin. Code § 44.4. *See* Leonard, 10 U. DAYTON L. REV. at 691 n.39.

[27] Even where communicable diseases are statutorily excluded, the extent of that exclusion is not clear. In Georgia, for instance, the Department of Human Resources continues to advise employers not to dismiss persons with AIDS because it is not clear that AIDS (which cannot be transmitted through casual contact) qualifies as a statutory "communicable disease." Letter from James W. Alley, Director, Division of Public Health, Georgia Dep't. of Human Resources to Benjamin Schatz (June 19, 1986).

[28] *See* discussion at footnotes 31 and 32 and accompanying text.

Attorney General, having determined that AIDS was a protected disability within the New York Human Rights Law, N.Y. Exec. Law §§ 290-301, FAIR EMPL. PRAC. LAWS (BNA) No. 531, at 455:3005-3018 (Jan. 1, 1986)[29] brought suit against a cooperative for its refusal to renew the lease of a doctor who treated AIDS patients. *See* N.Y.L.J., October 14, 1983, at 1, col. 1. The court denied a motion to dismiss for failure to state a claim, concurring with the Attorney General's conclusion that AIDS fits within the statutory framework.[30]

In *Shuttleworth v. Broward County Office of Mgmt. & Budget*, 2 EMPL. PRAC. GUIDE (CCH) ¶ 5014 (F.C.H.R. Dec. 11, 1985), the Florida Commission on Human Relations issued an opinion that AIDS is "within the coverage" of the Florida Human Rights Act, Fla. Stat. §§ 760.01-760.10 (1985). The Florida law does not define "handicap," but the Commission applied a "meaning accorded by common usage" to determine that persons afflicted with AIDS are protected from discrimination by state law. 2 EMPL. PRAC. GUIDE (CCH) ¶ 5014, at 6027. The Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations reached a similar conclusion in its recent

[29] Section 292 of that law defines "disability" much like Section 504 of the Rehabilitation Act defines "handicap:" "(a) a physical . . . impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function . . . or (b) a record of such impairment or (c) a condition regarded by others as such an impairment . . . ." FAIR EMPL. PRAC. LAWS (BNA) No. 531, at 455:3006.

[30] Later, the action settled favorably for the plaintiff. Leonard, 10 U. DAYTON L. REV. at 683 n.9. More recently, the New York State Division of Human Rights issued a policy statement which indicates it agrees AIDS is a handicap. Fact Sheet, New York State Division of Human Rights, *reprinted in* 8A LAB. REL. REP. (BNA), FAIR EMPL. PRAC. MANUAL No. 536, at 3081-82. The statement reads, in part: "Acquired Immune Deficiency Syndrome (AIDS) is a medical condition considered a disability under the New York State Human Rights Law." The Human Rights Division has announced that it is accepting and processing discrimination complaints from people who have, or are perceived to have, AIDS.

finding of illegal employment discrimination based on AIDS. *Racine Education Association v. Racine United School District*, 1 AIDS POL. & L. (BNA) No. 9, at 1 (ERD—Wis. DILHR April 30, 1986).

In most other states, cases involving AIDS and other infectious diseases have not yet reached a decision phase. Nevertheless, in at least twenty-eight other jurisdictions, the administrative agency charged with enforcing the physical handicap discrimination laws has determined that AIDS is a protected handicap,[31] or has

[31] A survey by NGRA of state agencies revealed that, in addition to the 3 states which have rendered decisions on the subject, the following 20 agencies also consider AIDS a handicap: California, Department's Post-Hearing Brief, *California Dep't. of Fair Employment & Housing in re Estate of Chadbourne v. Raytheon Co.*, No. FEP 83-84, L1-0310p, L-33998 (F.E.H.C. April 4, 1986); Colorado, Minutes of the Colorado Civil Rights Commission, March 28, 1986; Connecticut, Letter from Arthur L. Green, Director, Connecticut Comm. on Human Rights and Opportunities, to Benjamin Schatz (July 22, 1986); District of Columbia, Opinion Letter of John H. Suda, Acting Corporation Counsel, Government of the District of Columbia (Oct. 15, 1985); Illinois, Letter from Shelvin L. Hall, General Counsel, Illinois Dept. of Human Rights, to Benjamin Schatz (June 27, 1986); Maine, Testimony of Patricia E. Ryan, Exec. Director, Maine Human Rights Comm. before the Joint Standing Committee on Human Resources (Mar. 17, 1986), *reprinted in* 2 EMPL. PRAC. GUIDE (CCH) ¶ 5023; Massachusetts, Policy Statement, Massachusetts Comm. Against Discrimination (Jan. 1986), *reprinted in* 2 EMPL. PRAC. GUIDE (CCH) ¶ 5024; Michigan, Report of the Michigan Public Health Advisory Council to Governor James Blanchard at 32 (March 18, 1986); Minnesota, Letter from Walter C. Barwick, Deputy Commissioner, Minnesota Dept. of Human Rights, to Benjamin Schatz (June 3, 1986); Missouri, 1 AIDS POL. & L. (BNA) at 3 (June 18, 1986); Montana, Letter from Janice Doggett, Staff Attorney, Montana Human Rights Comm., to Benjamin Schatz (July 28, 1986); New Hampshire, Letter from Merryl Gibbs, Exec. Director, New Hampshire Comm. for Human Rights, to Benjamin Schatz (June 23, 1986); New Jersey, Announcement by the New Jersey Division on Civil Rights, *reprinted in* 2 EMPL. PRAC. GUIDE (CCH) ¶ 5026; New Mexico, Letter from David F. Montoya, Exec. Director, Human Rights Commission of New Mexico, to Benjamin Schatz (June 18, 1986); Oregon, Letter from Mary Roberts, Commissioner, Oregon Bureau of

indicated its willingness to accept AIDS-based discrimination complaints.[32] The states' interpretations of their own antidiscrimination laws as covering infectious diseases demonstrates that the application of Section 504 to disease handicaps would not conflict with state public health laws.

D. Prohibiting Irrational Discrimination Against Disabled Persons Would Not Thwart Public Health Laws

The Department of Justice argues that public health laws would be hampered were the Court to fail to create a "fear of contagion" exception to the scope of Section 504. Brief for the

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Labor and Industries, to James M. Campbell (Mar. 13, 1986), *reprinted in* 2 EMPL. PRAC. GUIDE (CCH) ¶ 5020; Pennsylvania, Letter from Louise Oncley, Special Ass't. to the Exec. Director, Pennsylvania Human Relations Comm., to Benjamin Schatz (July 15, 1986); Rhode Island, Letter from Eugene L. Booth, Exec. Director, Rhode Island Comm. for Human Rights, to Benjamin Schatz (June 25, 1986); Texas, Montrose Voice, Nov. 8, 1985; Washington, Letter from Mary Devlin, Unit Supervisor, Washington State Human Rights Comm., to Benjamin Schatz (June 6, 1986); West Virginia, Telephone conversation between Norman Lindell, Compliance Director of the West Virginia Human Rights Comm., and Benjamin Schatz (August 28, 1986).

[32] The following 8 states' enforcement agencies are willing to accept AIDS complaints: Alaska, Letter from Janet L. Bradley, Exec. Dir. of the Alaska Human Rights Comm., to Benjamin Schatz (June 30, 1986); Delaware, Letter from Andrew J. Turner, Jr., Dir., Delaware Div. of Human Relations, to Benjamin Schatz (August 20, 1986); Kansas, Letter from Roger W. Lovett, Chief Legal Counsel, Kansas Comm. on Civil Rights, to Benjamin Schatz (June 9, 1986); Nebraska, Letter from Lawrence R. Myers, Exec. Dir., Nebraska Equal Opportunity Comm., to Benjamin Schatz (June 3, 1986); Ohio, Letter from Robert D. Brown, Exec. Dir., Ohio Civil Rights Comm., to Benjamin Schatz (July 14, 1986); Tennessee, Telephone conversation between Charles Akens, General Counsel to the Tennessee Human Rights Comm., and Benjamin Schatz (August 28, 1986); Vermont, Letter from Denise R. Johnson, Chief, Public Protection Division, Vermont Office of the Attorney General, to Benjamin Schatz (July 14, 1986); Wyoming, Letter from Charles A. Rando, Supervisor, Labor Standards/Fair Employment Div., Wyoming Dept. of Labor and Statistics, to Benjamin Schatz (June 11, 1986).

United States as *Amicus Curiae* Supporting Petitioners, at 17-18. Yet all states have statutes or regulations prohibiting discrimination against otherwise qualified handicapped persons, and most of the states with such laws recognize that persons with infectious diseases are "handicapped." No state which recognizes that discrimination against a person with an infectious disease is discrimination against a "handicapped person" has created a wholesale "fear of contagion" exception to its antidiscrimination laws. This is because there is no contradiction between reasonable public health measures designed to control the spread of infectious disease and legal protection from discrimination of "otherwise qualified" persons with infectious diseases who pose no significant risk to the safety of others.[33]

Public health laws contemplate isolation for only a very few diseases. *See* discussion in Brief of the State of California as *Amicus Curiae* Supporting Respondent at Section I. A. In California, complete isolation is required only for victims of bubonic plague, cholera and diptheria. *Id.* A person with one of these diseases is likely to pose a significant risk to the safety of others in the workplace which cannot be reduced through modifications and therefore is probably not protected by Section 504.

Nor can it be argued that the understanding of Section 504 advanced in this brief would for the first time subject public health regulation to judicial scrutiny. Courts have long reviewed the exercise of state police powers in the public health context to insure compliance with federal constitutional requirements. *E.g.*, *Camara v. Municipal Court of The City and County of San Francisco*, 387 U.S. 523 (1967) (warrantless residential health, fire and housing inspections held unconstitutional); *Jacobson v.*

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[33] Whether an individual suffering from an infectious disease is subject to state health regulations or even quarantine often depends upon the medical evaluation of his case by public health officials. The bright-line distinction offered by the Petitioners and the Department of Justice, in contrast to the case-by-case approach we suggest, is entirely inconsistent with State law. It substitutes the grantee's judgment for that of public health officials by allowing grantees to effectively isolate persons with diseases based upon irrational fears not shared by public health officials.

Massachusetts, 197 U.S. 11, 38-39 (1905) (mandatory vaccination statute upheld, with the suggestion that compulsory vaccination of adults medically unable to withstand vaccination is impermissible); *Jew Ho v. Williamson*, 103 F. 10 (C.C.D. 1900) (quarantine of entire Chinatown district of San Francisco invalidated). *See generally* Burris, *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE L. & POL. REV. 479, 484-96 (1985).

Moreover, courts reviewing public health actions typically insist that such actions be justified by medical necessity and supported by medical evidence. *E.g.*, *Jew Ho v. Williamson*, 103 F. at 21-23. *See generally* Burris, 3 YALE L. & POL. REV. at 484-96. There is no reason the Supreme Court should permit a lower standard for determining whether an individual is protected by Section 504.[34] The Supreme Court would not permit a state to impose restrictive public health measures on the basis of a good faith but medically unfounded belief that an individual poses a risk to the health and safety of others. Similarly, it should not permit grantees to discriminate on the basis of such a belief.[35]

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[34] Indeed, courts have applied strict standards of medical necessity in recent Section 504 decisions. *See New York State Ass'n. for Retarded Children, Inc. v. Carey*, 612 F.2d 644 (2d Cir. 1979) (no medical justification for the educational segregation of mentally retarded children infected with hepatitis B); *Grube v. Bethlehem Area School District*, 550 F. Supp. 418 (E.D. Pa. 1982) (no medical basis for excluding a boy with one kidney from his high school football team); *Poole v. South Plainfield Board of Education*, 490 F. Supp. 948 (D.N.J. 1980) (insufficient medical justification for excluding a boy with one kidney from his school's wrestling program).

[35] In fact, health and safety decisions made by grantees should be subject to greater scrutiny than state public health measures. The latter typically are made on the advice of professional public health workers; the former often are made by persons lacking medical expertise.

II.

RESPONDENT MAY BE "OTHERWISE QUALIFIED" FOR HER JOB GIVEN "REASONABLE ACCOMMODATION" OF HER HANDICAP BY PETITIONERS

A. Determining Whether a "Handicapped Individual" Is "Otherwise Qualified" Requires a Case-By-Case Analysis

Courts consider the particular facts of a case in determining whether a disabled individual is "otherwise qualified" for the position sought.[36] The Supreme Court has reasoned that:

> the question of who is "otherwise qualified" and what actions constitute "discrimination" under [Section 504] would seem to be two sides of the same coin; *the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped.*

Alexander v. Choate, 105 S. Ct. at 720 n.19 (emphasis added). Consequently, Section 504 involves a balancing of the facts on a case-by-case basis. In *Alexander*, the Supreme Court concluded that:

> *Davis* thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.

105 S. Ct. at 720. The language of Section 504, its implementing regulations, the evidence of Congressional intent, and the Su-

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[36] Section 504 protects only "otherwise qualified handicapped individual(s)" from discrimination. 29 U.S.C. § 794 (1985) (emphasis added). The DHHS regulations define a "qualified handicapped person" as one who *"with reasonable accommodation* can perform the essential functions of the job in question. . . ." 45 C.F.R. § 84.3(k)(1) (1985) (emphasis added).

preme Court's construction all require individualized consideration of a person's handicap.

Handicaps come in almost infinite varieties and degrees.[37] The feasibility of accommodating handicaps in different working situations, and educational and other programs, is just as varied. The balance required by *Alexander* can only be struck through careful consideration of what is reasonable in individual cases. Since the evaluation of whether a disability is a handicap under Section 504 is so fact specific, the Supreme Court should not render a blanket ruling that diseases thought to be contagious are not handicaps. Such a blanket ruling would eviscerate the Act. Courts "cannot, in the absence of an unmistakable directive, construe [a statute] in a manner which runs counter to the broad goals which Congress intended it to effectuate." *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1967) (Clayton Act as amended by Robinson-Patman Act).

B. Petitioner Bears the Burden of Proving that Accommodation Is "Unreasonable"

The language of Section 504 makes it apparent that Congress intended it to be part of the general corpus of discrimination law. *New York State Association for Retarded Children, Inc. v. Carey*, 612 F.2d at 649. It is a well-established principle of discrimination law that once the plaintiff has established a *prima facie* case that he has suffered discrimination, the defendant must present evidence to rebut the inference of illegality. *E.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (Title VII of the 1964 Civil Rights Act).[38] The DHHS regulations implementing Section 504 provide that:

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[37] In particular, the class of known infectious diseases is very large. The effects of particular diseases vary greatly in terms of their causes, debilitating effects, and degree of contagion. *See* Brief for American Medical Association as *Amicus Curiae* Supporting Petitioners at 2-3. Like other types of handicaps, it is impossible to issue a blanket ruling regarding their accommodation under Section 504.

[38] The Rehabilitation Act of 1973 was enacted by Congress within a few months of the Supreme Court's decision in *McDonnell Douglas*. "Congress must have been aware that the discrimination law language of Section 504 would have obvious implications for the burden of proof issue." *New York State Ass'n. for Retarded Children, Inc. v. Carey*, 612 F.2d at 649 n.5. Further, Section 120(a) of the 1978 Amendments to the Rehabilitation Act, 92 Stat. at 2983, makes the rights, remedies and procedures available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, applicable to Section 504 of the 1973 Rehabilitation Act, clearly reflecting congressional intent that burdens under Section 504 be treated like those in other discrimination actions.

> A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee *unless the recipient can demonstrate* that the accommodation would impose an undue hardship on the operation of its program.

45 C.F.R. § 84.12(a) (1985) (emphasis added).

Following the Supreme Court's decision in *Davis*, the Fifth Circuit in *Prewitt* held that the burden of showing inability to accommodate a handicap rests with the employer because:

> The employer has greater knowledge of the essentials of the job than does the handicapped applicant. The employer can look to its own experience, or, if that is not helpful, to that of other employers who have provided jobs to individuals with handicaps similar to those of the applicant in question. Furthermore, the employer may be able to obtain advice concerning possible accommodations from private and government sources.

662 F.2d at 308. Persons with disabilities who can perform the required work with reasonable accommodation are "otherwise qualified" and thus protected by the Rehabilitation Act.[39] Similarly, an individual may be "otherwise qualified" even if he or she cannot meet all of a program's requirements. "This is the case when the refusal to modify an existing program to accommodate the handicapped individual would be unreasonable . . . " *Strathie v. Department of Transportation*, 716 F.2d 227, 230 (3d Cir. 1983).

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[39] Of course, many disabled individuals can safely perform all job functions with no accommodation at all.

Section 504 is designed to insure that decisions about the handicapped are not made as a result of fear, stereotypes or prejudice. S. REP. NO. 1297, 93 Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373. Accordingly, grantees are obligated to make reasonable decisions based on rational, individualized, medical judgments about the nature, degree and duration of the handicap and the risk to third parties. In this respect, we agree with the position taken by the American Medical Association as *amicus curiae* in this case:

> rather than allowing employers to act irrationally toward such handicapped individuals based on a fear of a perceived danger to third parties, the better course, as set forth in *Southeastern Community College* [*v. Davis*] is to focus on the issue of whether the handicapped individual is "otherwise qualified."

Brief for American Medical Association As *Amicus Curiae* Supporting Petitioners at 25.

A grantee's decisions often have been subjected to judicial scrutiny to effect Section 504. For example, in *Pushkin v. Regents of the University of Colorado*, the defendant university had denied the plaintiff admission to its psychiatric residency program because of his multiple sclerosis. The university argued that its assessment of Pushkin's capabilities were entitled to great deference and could only be reversed if shown to be not reasonably related to a legitimate state purpose. 658 F.2d at 1383.[40] The *Pushkin* court explicitly rejected such a "rational basis" analysis, reasoning that Section 504 places a higher burden on a defendant once a plaintiff has established a *prima facie* case of handicap discrimination. *Id.* at 1384-85. Judicial deference to a grantee's apparently discriminatory decision is simply at odds with the purpose of Section 504 since any grantee could insure itself an

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[40] The defendant argued that judicial deference should give way to its decision as long as its decision was rationally related to its legitimate need to select applicants for its programs.

absolute defense by rationalizing its decision upon a seemingly non-discriminatory ground.[41]

A grantee may argue, as an *affirmative defense* to an action under Section 504, that an individual is not otherwise qualified because his presence in the workplace would pose a significant risk to the safety of others. *See New York State Association for Retarded Children, Inc. v. Carey*, 612 F.2d at 650 (exclusion of hepatitis B carrier children from public school barred by section 504 because school board unable to demonstrate that a serious possibility of transmittal existed); Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of The Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 463-67 (1984). The "public safety" defense thus permits a grantee to refuse to employ an individual with a contagious disease if it can prove, with reliable medical evidence, that the individual poses a significant possibility of transmitting the disease in the workplace, despite the grantee's reasonable efforts to reduce that possibility.

Petitioners, and the Department of Justice as *amicus curiae*, would have the courts abdicate their duty to scrutinize grantee decisions about persons with handicaps. Petitioners' Brief at 39-41; Brief for the United States as *Amicus Curiae* Supporting Petitioners, at 26 ("we see no basis for second-guessing either the school board's assessment of the health risks presented [by Respondent's handicap] or its determination that those risks were unacceptably high"). In a similar vein, the Department of Justice would allow grantees to affirmatively discriminate against persons with communicable diseases, more specifically those with AIDS, based on nothing more than the grantee's claim of a fear of contagion—whether reasonable or not. DOJ Opinion at 31. This strained interpretation of the statute does violence to the fundamental congressional purpose of Section 504, which is to protect handicapped persons against discrimination based on irrational stereotypes.

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[41] *See also* cases cited in footnote 42, *infra*.

It is axiomatic that Section 504 requires employers to do something more for the handicapped than for the non-handicapped. To read the statute otherwise would reduce its language to a hollow platitude because "the handicapped typically are not similarly situated to the non-handicapped." *Alexander*, 105 S. Ct. at 719.

> Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance. . . . *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers.

Alexander, 105 S. Ct. at 722; *see also Holland v. Boeing Co.*, 583 P.2d 621, 623 (Wash. 1978) ("Identical treatment may be a source of discrimination in the case of the handicapped. . . ").

Accordingly, courts must scrutinize grantee policies or job requirements which adversely affect disabled persons. Allegations that challenged policies are justified by potential injury to others must be based on informed and reasoned judgment about the particular handicapping condition of the particular individual affected. In this case, Petitioners have made no medically-defensible showing that Respondent's condition poses a significant risk to others. Rather, in the courts below, they have relied on broad conclusions about tuberculosis in general (J.A. at 11-12). The case should be remanded to develop the particular facts of Respondent's condition.

Once a person with a disease has established a *prima facie* case of discrimination, the burden shifts to the grantee to demonstrate, with sound medical evidence, that the disabled person cannot be reasonably accommodated in its program without significant risk to others.[42] To allow grantees to exclude persons from programs

[42] A number of courts have already imposed a burden on a grantee to provide evidence supporting assertions that a handicapped person cannot be accommodated. *See, e.g., Jasany v. U.S. Postal Service*, 755 F.2d at 1249-50 ("Once a *prima facie* case has been presented, the burden shifts to the defendant employer to demonstrate that challenged criteria

based upon a fear of contagion without reliable medical evidence of any significant harm would permit the very discrimination based upon irrational beliefs which Section 504 prohibits.

C. The Accommodation Respondent Requests May Be "Reasonable" Under Section 504

The District Court erred in concluding that Respondent was not "otherwise qualified" without considering the available means of minimizing any risk she posed. The types of accommodation Respondent requests Petitioner to consider are facially reasonable under the relevant regulations. A leave of absence or a change in teaching duties to allow Respondent to teach older children would not necessarily impose undue financial or administrative burdens on the school system. The DHHS regulations state that:

> Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) *job restructuring, part-time or modified work schedules*, acquisition or modification of

are job related and required by business necessity, and that reasonable accommodation is not possible."); *Strathie v. Department of Transportation*, 716 F.2d at 230-31 (Section 504 requires recipients of federal funding to show "a factual basis in the record reasonably demonstrating that accommodating [the handicapped] individual would require either a modification of the essential nature of the program, or impose an undue burden on the recipient;" no harm shown in employing deaf person as bus driver where his hearing could be brought within limits with a hearing aid); *Treadwell v. Alexander*, 707 F.2d at 475, 478 ("Once a plaintiff shows an employer denied him employment because of phyical condition, the burden of persuasion shifts to the . . . employer to show that the criteria used are job related and that the plaintiff could not safely and efficiently perform the essentials of the job, . . . the . . . employer has the ultimate burden of persuasion in showing an inability to accommodate"); *Doe v. New York University*, 666 F.2d 761, 776-77 (2d Cir. 1981) (once the plaintiff has established a *prima facie* case, "[t]he burden then shifts to the institution or employer to rebut the inference that the handicap was improperly taken into account . . . "); *Pushkin* (no harm shown in allowing psychiatrist with multiple sclerosis to complete a residency); *New York State Ass'n. for Retarded Children, Inc. v. Carey (no harm proven in allowing other children to attend school with hepatitis B carriers)*.

equipment or devices, the provision of readers or interpreters, and other similar actions.

45 C.F.R. § 84.12(b) (1985) (emphasis added). Further, "[j]ob restructuring may entail shifting nonessential duties to other employees." 45 C.F.R. § 84, App. A, at 316 (1985). While this listing of actions that constitute reasonable accommodation in Section 84 of the regulations is some guide for the courts, "[t]he list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed." *Id.* at 315. A modified work schedule could include a temporary leave of absence. Job restructuring could include changing Respondent's duties to allow her to teach older children or perform administrative tasks. The range of reasonable restructuring may be reflected in an employer's existing policy of providing its workers with employment alternatives.

The range of reasonable restructuring is ultimately determined by a balancing of its effectiveness in allowing the particular handicapped person "meaningful participation" in the workplace environment and the administrative and financial burdens it will impose on the employer. In applying Section 504, courts have performed just such a case-by-case balancing.[43]

In this case, no court has yet addressed the feasibility and reasonableness of the particular types of accommodation Respondent requests. Nor has any court considered whether that accommodation is, under Section 504, a reasonable means to allow a person with her particular disability to be productively employed. Most importantly, however, the District Court record in this case is far from sufficient to permit the informed balancing that Section 504 requires to determine if accommodation of Respondent's handicap is feasible and reasonable.

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[43] *See, e.g., Alexander; Strathie v. Department of Transportation* (alteration of state policy against bus driver's use of hearing aid while driving would not endanger public safety); *see also* cases cited in footnote 42, *supra*, and discussion of *Pushkin* at text accompanying footnotes 40-41.

CONCLUSION

Amici Employment Law Center, NGRA, BALIF and LAMBDA respectfully submit that the applicability of Section 504 to grantees' decisions affecting persons with infectious diseases should be assessed on an individual basis. Grantees should be required to prove with reliable medical evidence a potential for significant harm, which cannot be avoided through reasonable accommodation, to justify excluding handicapped persons with infectious diseases from their programs. For these reasons, the decision of the Court of Appeals remanding the action for further development of the record should be affirmed.

Dated: September 18, 1986

Respectfully submitted,

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No. 85-1277

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IN THE SUPREME COURT

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UNITED STATES

OCTOBER TERM, 1986

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v.

GENE H. ARLINE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL AUTHORITIES LODGED WITH BRIEF OF THE EMPLOYMENT LAW CENTER, NATIONAL GAY RIGHTS ADVOCATES, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, vs. RAYTHEON COMPANY, Respondent. ESTATE OF JOHN R. CHADBOURNE, Complainant.	CASE NO. FEP83-84 L1-0310p L-33998 L1-0310p

DEPARTMENT'S POST-HEARING BRIEF

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INTRODUCTION

The instant case is a prosecution under the Fair Employment and Housing Act (hereafter referred to as "the Act") for physical handicap discrimination. The facts of this case demonstrate that Respondent Raytheon Company (hereafter referred to as "the company," "Respondent," or "Raytheon") failed to reinstate Complainant, John R. Chadbourne (hereafter referred to as "Chadbourne" or "the Complainant") to his former position of Quality Control Analyst because of his physical handicap, acquired immune deficiency syndrome (hereafter referred to as "AIDS").

JURISDICTION

The Fair Employment and Housing Department's (hereafter referred to as "the Department") Exhibit 1,[1]/ the Pleading File, established the jurisdiction of the Fair Employment and Housing Commission (hereafter referred to as "the Commission"). It is not disputed that on the date Complainant was not reinstated, Respondent had five or more employees and was an employer within the meaning of Government Code section 12926(c).

STATEMENT OF THE CASE

On April 16, 1984, Complainant filed a verified

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[1]/ Citations to the Exhibits will be as follows: (Exhibit number, roman numeral or letter). The Department's exhibits will be identified by number. The Complainant's estate's exhibits will be identified by roman numeral. The Respondent's exhibits will be identified by letter.

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complaint with the Department alleging unlawful employment discrimination on the basis of physical handicap against Raytheon. On January 3, 1986, Complainant died due to complications arising from AIDS. After conducting an investigation, the Department issued an Accusation against Respondent on February 5, 1985. The Department amended the Accusation on March 8, 1985.

On June 4, 1985, Complainant's estate made a Motion to Intervene. On June 19, 1985, the Commission granted Complainant's Estate's Motion to Intervene.

A hearing was held on November 5 through 8, 1985 before the Honorable Richard J. Lopez, sitting for the Fair Employment and Housing Commission. The hearing was reconvened on January 6 through 9, 1986, in Oxnard, California. On January 13, 1986, the record was held open for an on-site view of Raytheon's plant in Goleta, California, where Chadbourne worked. The Department was represented by Gloria Barrios, Staff Attorney. The Respondent was represented by Alfred C. Phillips. The Complainant's estate was represented by Peter F. Laura. The record was held open for submission of post-hearing briefs. The instant brief is the Department's Post-Hearing Brief.

STATEMENT OF FACTS

John R. Chadbourne began working for Raytheon[2]/ in

2/ Raytheon manufactures military hardware, most of which is classified and secret.

Goleta, California on February 4, 1980, as an Incoming Inspector. His job duties were to inspect incoming materials in order to insure that such materials met with contractual and governmental specifications. In 1981, Chadbourne was promoted to the position of Quality Control Analyst. His job duties were to investigate failures that were reportable to the government, analyze the cause of those failures and provide corrective action (Exh. 2 pp. 5-12).[3]/ He had no contact with the public nor with vendors. Chadbourne did have casual contact[4]/ with Raytheon engineers and a few fellow employees (Exh. 2 49-50 : RT III 435, 13-24).[5]/ On December 15, 1983, Chadbourne was diagnosed as having AIDS. He also had pneumocystis carnii, a type of pneumonia associated with AIDS patients. He was hospitalized at Cottage Hospital in Santa Barbara, California, from December 15, 1983 through January 12, 1984. One of his attending physicians was Dr. Stephen Hosea, a specialist in infectious disease (Ex. 2 12-16 : RT I 126, 130, 22-23, 1-5 : Exh. 4).

Following his release from the hospital, Chadbourne attempted to return to his position at Raytheon. On January

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3/ Department's Exhibit 2 is a transcript of the Deposition of Chadbourne taken on October 29, 1984.

4/ "Casual contact" for purposes of this case means no intimate, sexual or blood to blood contact between persons (RT I 45, 14-16).

5/ Citations to the Reporter's transcripts of the instant hearing will be codified as follows: (Volume number : page number : line number).

20, 1984, he scheduled a physical examination with Raytheon's physician, Dr. Alexander Donald. At the time of the exam, both Dr. Donald and a Raytheon nurse, Patricia Heybl knew from one of Chadbourne's attending physicians that Chadbourne had AIDS. The Complainant gave Dr. Donald a letter from Dr. Hosea stating he could return to work (Exh. 5; Ex. 2, pp. 20-21 : RT III 536-538, 9-19, 20-22, 22-23; RT V 897, 902-905, 914, 11-12, 3-13, 14-25, 1-3, 23-25, 1-5, 18-25). Dr. Hosea's letter stated in part:

> "Of note is that there have been no cases of acquired immunity deficiency syndrome in close contacts of patients with AIDS. It seems like this disease can only be transmitted by blood transfusions, sharing of intravenous needles of sexual contact (Exh. 5).

During the examination,[6]/ Dr. Donald told Chadbourne he had spoken with Dr. Hosea. In that telephone conversation, Dr. Hosea had assurred Dr. Donald there was no evidence AIDS can be transmitted casually (RT I 143-144, 12-25, 1-17). Dr. Donald told Chadbourne that he was only a general practitioner and thus, was not qualified to make a decision as to whether or not Chadbourne could be reinstated. Dr. Donald told Chadbourne he would have to rely on the opinions of doctors who specialized in the area of infectious diseases such as

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[6]/ Raytheon's physical examination of Chadbourne consisted of Nurse Heybl checking Chadbourne's temperature, pulse and blook pressure (Exh. 2 p. 21). Raytheon did not conduct a full medical examination of Chadbourne after he was diagnosed as having AIDS (RT III 584, 6-13).

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Dr. Charles Juels, epidemiologist[7]/ at Santa Barbara County Health Department and Dr. Hosea (Exh. 2 pp. 21-22 : RT III 539-560, 567, 584, 22-25, 1-8, 14-21, 14-25 : Exh. 10). Dr. Juels had written Raytheon on January 13, 1984, regarding Chadbourne's condition stating that AIDS cannot be transmitted through casual social contact (Exh. 17 ; Exh. H : RT III 439-441, 8-25, 1-25, 1-3; RT V 909-910, 14-21, 9-12).

Dr. Donald indicated to Chadbourne that he could return to work at Raytheon. He told Chadbourne that if he had any problems with co-workers, he should refer them to him, Dr. Donald. Dr. Donald said he was signing the necessary paperwork and would forward such papers to Frank Umanzio, Personnel Director at Raytheon (Exh. 2 pp. 22-24).

On January 25, 1984, Nurse Heybl and Dr. Donald met with Dr. Juels regarding Chadbourne's condition. During the meeting, Dr. Juels informed Dr. Donald and Nurse Heybl that Chadbourne's condition posed no health threat to other employees at Raytheon since AIDS is only transmitted via blood and blood products such as by sexual intercourse, blood transfusions and sharing of intravenous needles. At that time, Dr. Juels was also shown where Chadbourne worked in Raytheon. He concluded Chadbourne worked in a relatively isolatd area, had no contact

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[7]/ Epidemiology is the study of epidemics and epidemic diseases (RT II 211, 10-22, 11-13, 248). It is the science that follows the trends of a disease through the community. It brings together the facts in order to determine the cause of a disease and the ways in which the disease is transmitted. (RT II 211, 10-22.)

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with the public, had casual contact with co-workers and faced little risk of injury. At the conclusion of the meeting, Dr. Donald told Dr. Juels, he was convinced AIDS is not spread through casual contact (RT III, 433-437, 570-573, 22-25, 1-25, 1-15, 25, 1-25, 1-22 : RT V 917-918, 11-25, 1-5 : Exh 19).

Nurse Heybl and Dr. Donald further investigated whether Chadbourne's condition represented a risk to employees at Raytheon by contacting the United States Department of Health and Human Services, Public Health Service, Centers for Disease Control (hereafter referred to as "CDC")[8]/ in Atlanta, Georgia. Nurse Heybl spoke with Dr. Kenneth Kastro, who informed her that AIDS cannot be transmitted through casual contact, such as exists in the workplace. Nurse Heybl and Dr. Donald reviewed Morbidity and Mortality Weekly Reports (hereafter MMWR's) published by the CDC which indicated AIDS cannot be transmitted via casual contact (RT III pp. 544-545, 16-25 ; RT V 926-927, 945, 2-21, 1-25 : Exh. I-A, I-B : Exh. I ; Exh. 20).

On January 26, 1984, Dr. Donald wrote a confidential memo to Umanzio recommending that Chadbourne be reinstated. In part, he wrote:

> "I agree that with the material evidence we have on hand, the report from the CDC, (Center for Disease

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8/ The CDC is a branch of the Department of Public Hearing which complies and distributes health information nationwide regarding epidemiology and surveillance of diseases. They publish a weekly bulletin (MMWR) to physicians to provide them with the most up-to-date information regarding such diseases. The CDC is recognized by experts as the authoritative source of information regarding AIDS (RT I 32, 137, 11-19, 2-11; RT II 253-255, 14-25, 1-25, 1-14; RT III 409, 17-25; RT VIII 1333-1334, 13-25, 1-21).

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> Control), the discussion with Dr. Charles Juels and upon physical examination, this individual (Complainant) can return to his job." (Exh. 19 : RT III 598, 601, 8-12, 18-24.)

Despite the recommendation from Dr. Donald, Dr. Hosea, Dr. Juels, CDC and the relevant medical literature, Raytheon did not reinstate Chadbourne. He was placed on medical leave of absence (Exh. 2, pp. 27-29). In February, 1984, Nurse Heybl wrote Dr. Juels for more information regarding the communicability of AIDS. Dr. Juels wrote her back and reiterated that Chadbourne's condition posed no risk to Raytheon's employees (Exh. 16; Exh. 18 : RT III 441-444, 7-23, 16-25, 1-25, 1-19; RT V 928, 1-15). An AIDS group offered to give a seminar to Raytheon employees regarding AIDS. Raytheon declined the offer and continued to refuse Chadbourne's reinstatement (RT V 961, 13-25).

Chadbourne continuously attempted to return to Raytheon. He lost much hope of returning to work when, in February, 1984, Umanzio told him he could not return until there was a cure for AIDS (Exh. 2 pp. 33-34). On at least three separate occasions, Chadbourne brought information to Raytheon's attention which indicated that AIDS cannot be transmitted casually (Exh. 2, pp. 35-37 : RT V 954, 11-18 : Exh I).

Although Chadbourne retained his employee status at Raytheon, he was not allowed to return to his former position so he began doing volunteer work at the Western Addiction Services Program at the Gay and Lesbian Center in Santa Barbara in April,

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1984. He continued his volunteer work until October, 1984 (RT I 147, 14-24 : Exh. 2, pp. 4-5).

In July, 1984, Chadbourne was diagnosed as having Kaposis sarcoma,[9]/ a type of cancer associated with AIDS patients (Exh. 2 pp. 72-73 : RT I 144-145, 18-25, 1).

In July, 1984, Chadbourne was deemed to be totally disabled for insurance purposes. Chadbourne's main source of income was disability payments and since Raytheon would not reinstate him he could only get continued disability payments by having Dr. Hosea declare him to be totally disabled (Exh. 6 : RT I 148-149, 11-25, 1-4; RT IV 957, 3-7).

On January 6, 1985, Chadbourne died of complications due to AIDS (RT I 142, 2-4 : Stip. RT III 567, 4-10).

ARGUMENT

I

RESPONDENT DID NOT REINSTATE CHADBOURNE BECAUSE OF HIS PHYSICAL HANDICAP

Respondent violated Government Code section 12940, subd. (a) when it failed to reinstate the Complainant because he had AIDS, a physical handicap. Physical handicap discrimination is established if the Department shows by a preponderance of the evidence that a causal connection exists between a physical handicap of Complainant and an action against him by Respondent.

9/ Heretofore, Kaposis sarcoma had been only associated with elderly Jewish men (RT I 72, 7-10).

(DFEH v. Northrop Services (1983) FEHC Dec. No. 83-11, at p. 8 [1982-83 CEB 12]; DFEH v. Ametek (1980) FEHC Dec. No. 80-11, at p. 11 [1980-81 CEB 4]; DFEH v. San Jose (1984) FEHC Dec. No. 84-18, at p. 11 [1984-85 CEB 6].) The evidence need not demonstrate that Complainant's condition was the sole or even the dominant cause of the adverse action. Discrimination is established if the handicap was at least one ofthe factors that influenced Respondent. DFEH v. Kingsburg Cotton Oil Co. (1984) FEHC Dec. No. 84-30, at p. 21 [1984-85 CEB 11] petn. for writ of mandate granted on other grounds, app. pending; DFEH v. San Jose, supra, FEHC Dec. No. 84-18, at p. 11; DFEH v. Louis Cairo (1984) FEHC Dec. No. 84-04, at p. 14 [1984-85 CEB 3]. The Department has shown a causal connection. Respondent admits it did not reinstate the Complainant because he had AIDS. It is clear AIDS is a physical handicap within the meaning of the Act.

In 1982, the California Supreme Court held, that for purposes of employment discrimination, a physical handicap is any physical condition which is actually or potentially handicapping or is perceived by the employer to be potentially disabled even though the Complainant has no current job disability or job-related health risk. American National Insurance v. FEHC (1982) 32 Cal.3d 603, 610, 186 Cal. Rptr. 345, 349, 651 p.2d 1151 (hereafter "ANI").

The Court defined "handicapping" and "handicap" very broadly. Quoting from Webster's Dictionary, it stated a "handicap" is a "disadvantage that makes achievement unusually difficult." Id at p. 609. Thus, under this broad definition, if

a person has a physical condition and an employer takes an adverse employment action against that person because of his physical condition, then employment achievement has been made unusually difficult for that person, and he is "physically handicapped" within the meaning of the Act.

The court held that the intent of Government Code section 12926, subd. (h) of the Act[10]/ which defines "physical handicap" indicated the legislature in California intended the scope of the definition of physical handicap to be broad and not limited to present disabilities as listed in Section 12926, subd. (h). Id at 608-610. The court found, that, to hold otherwise, would be to allow arbitrary employment discrimination for future disabilities but legal protection provided for those suffering the same hardship because it is presently disabling. The court also stated that under Section 12993, subd. (a), "the provisions of the Act are to be construed 'liberally for the accomplishment of the purposes thereof. . ."

Section 12920 provides in relevant part:

> "It is hereby declared as the public policy of this state that it is necessary 'to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of. . .physical handicap. . . .'."

10/ A "physical handicap" is defined as including "impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services." Government Code section 12926(h).

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Indeed it is with this mandate in mind that the Fair Employment and Housing Commission (hereafter referred to as "the Commission") has found not only high blood pressure to be a physical handicap, ANI, supra, 32 Cal.3d 603, but a variety of other conditions to be physical handicap covered under the law such as epilepsy, Louis Cairo, supra, FEHC Dec. No. 84-04, back conditions such as scoliosis and spondiolisis, San Jose, supra, FEHC Dec. No. 84-18; allergy, DFEH v. Fresno County (1984) FEHC Dec. No. 84-27 (1984-85 CEB 6); snycope or temporary loss of consciousness, dizzy spells, fainting or blackouts, DFEH v. Southern Pacific Transportation (1980) FEHC Dec. No. 80-30 (1980-81 CEB 5); paralysis, colostomy, fused hip and hearing disability, DFEH v. City of Anaheim (1982) FEHC Dec. No. 82-08 (1982-83 CEB 4); diabetes and angina, DFEH v. City of Modesto (1979) FEHC Dec. No. 79-15 (1978-79 CEB 6).

Similarly, the federal courts have taken an expansive view of the definition of physical handicap under the Federal Rehabilitation Act of 1973 (hereafter referred to as "the Rehab. Act") which provides that:

> "No otherwise qualified handicapped individual. . . shall, solely by the reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . ."

29 U.S.C.A. §794 (West Supp. 1985).

An employer who receives "federal financial assistance" is subject to the provisions of the Rehabilitation Act and, where

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coverage exists, the Rehab. Act makes it impermissible for an employer to discriminate against a "qualified handicapped person". A "qualified handicapped person" is a person who, in spite of his handicap, is able to perform the essential features of his or her job. Southeastern Community College v. Davis 422 U.S. 397, 406, S.Ct. 2361, 60 L. Ed. 2d 980, 988 (1979).

An expansive definition of the conditions that constitute "handicap" under the Rehab. Act has been adopted by the federal court. In Bentivegna v. United States Department of Labor (9th Cir. 1982) 694 F.2d 619, 621, the United States Court of Appeals for the Ninth Circuit accepted without comment the undisputed proposition that a diabetic employee with high blood sugar levels, considered by his employer to be "uncontrolled," was a handicapped person for the purposes of the Rehab. Act.

In Arline v. Nassau County (11th Cir. 1985) 772 F.2d 759, the court held that tuberculosis, as a contagious disease, constituted a handicap within the meaning of the Rehabilitation Act. Section 504 of the Act defines a "handicapped individual" as one who (i) has a physical or mental impairment which substantially limits one or more of such person's major lite activities, (ii) as a record of such impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. § 706(7)(B)." The language of these provisions in every respect supports a conclusion that "persons with contagious diseases are within the coverage of Section 504," according to the court.

In Arline, a teacher who had first contracted tuberculosis at age 31 was fired after her third relapse. She

contented that risk of infection to her students was minimal, or in the alternative, the school should have accommodated her handicap by transferring to a temporary position teaching less susceptible persons. According to the court, since tuberculosis substantially limits one or more major life activities, it is a physical handicap within the meaning of the Rehab. Act. Likewise, a contagious disease like AIDS also limits major life activities.

A person with AIDS is physically handicapped under state law because AIDS damages the immune system[11] to such an extent that a person with AIDS is not able to fight off opportunistic infections and those infections proceed unhindered to damage the body in a variety of ways. Among those infections are Kaposi sarcoma and carinii pneumonia as found in Chadbourne's case. (Leonard, Employment Discrimination Against Persons with AIDS (1985) 10 U. Dayton Law Review 681; RT I 29-30, 18-25, 1-2.) A person suffering from AIDS suffers a tremendous disability, which includes weight loss, fatigue, diarrhea and lesions associated with Kaposi sarcoma (RT I 31, 16-22). Even assuming that AIDS is not presently disabling, the syndrome progresses and becomes disabling (RT I 31, 150, 16-22, 22-24). Moreover, the mortality rate of persons afflicted with AIDS after

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[11] The Commission's Regulation 7293.6 subd. (d) Cal. Admin. Code, Tit. 2, defines the phrase in Government Code section 12926(h) "impairment of physical disability due to loss of function" to include: "[A]ny physiological disorder or condition. . . affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine."

two years is eighty percent, after three years, it is nearly one hundred percent (RT I 84, 173, 3-7, 10-11). Since AIDS attacks the immune system and other body system, AIDS qualifies as a physical handicap under the Commission's regulations.

The Florida Commission on Human Relations recently found AIDS to be a physical handicap within the meaning of Florida's definition of physical handicap and recent state and federal cases. Shuttleworth v. Broward County Office of Budget and Management Policy (1985) FCHR Dec. No. 85-0624.

Thus, Chadbourne's condition is a physical condition within the meaning of the Act, alternatively, because he was disabled during the relevant time period, he was potentially going to be disabled and/or he was perceived to be disabled by Raytheon when they refused to reinstate him. San Jose, supra, FEHC Dec. No. 84-18, at pp. 11-12; ANI, supra, 3d Cal. 3d 603, at pp. 608-610.

Having established that Respondent discriminated against Complainant because of his physical handicap in violation of Government Code section 12940, subd. (a), the burden then shifts to Respondent to establish an affirmative defense.

II

RESPONDENT FAILS TO ESTABLISH BY PREPONDERANCE OF THE EVIDENCE ANY AVAILABLE DEFENSE

Respondent seeks to rely on one affirmative defense, which it must establish by preponderance of all the evidence. (Sterling Transit Co. v. Fair Employment Practice Commission

(1981) 121 Cal. App. 3d 791, 794 at 796; DFEH v. City of Anaheim Police Department, supra, FEHC Dec. No. 82-08, at pp. 8, 12, 14 [1982-83 CEB 4]; DFEP v. Interstate Brands (1979) FEHC Dec. No. 78-05, at p. 17, fn. 12; DFEH v. San Jose, supra, FEHC Dec. No. 84-18, at p. 12.)[12]/ Respondent has not met its burden.

A. Danger to the Health and Safety of Others

Respondent argues that Complainant would "endanger. . . the health and safety of others" if he had been allowed to return to his former position at Raytheon. (Government Code Section 12940, subd. (a)(1).) To establish this defense, the evidence that Complainant's condition would create danger "significantly greater" than that posed by someone performing the job who was not afflicted with AIDS. DFEH v. City of Anaheim Police Department, supra, FEHC Dec. No. 84-08, at pp. 14-15; DFEH v. Southern Pacific Transportation Co., supra, FEHC Dec. No. 80-30, at p. 8; DFEH v. San Jose, supra, FEHC Dec. No. 84-18, at pp. 16-17; Cal. Admin. Code, tit. 2, § 7293.8, subd. (c).)

Respondent argues that Chadbourne's condition posed a

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[12]/ Respondent did not dispute that Complainant was physically able to perform the job of Quality Control Analyst at the time the company faild to reinstate him, and thus asserted no affirmative defense on thatground or that Chadbourne would endanger his health and safety if he returned to work. (Government Code Section 12940, subd. (a)(i); RT III 463, 23-25; RT V 881, 5-16; RT VII 1275-1276, 1-25 : Exh. 21). Respondent also claims no bona fide occupational qualification (BFOQ) affirmative defense. (Government Code Section 12940; RT VI 1161-1162, 25, 1-13.)

danger of infection to other co-workers at Raytheon. Yet, Respondent did not offer a scintilla of evidence which supports the proposition that AIDS can be transmitted to another person via casual contact which existed in the workplace at Raytheon. To the contrary, the information Raytheon received during the relevant time period and the expert medical evidence submitted at the hearing all pointed to the fact that AIDS is only transmitted through semen, blood and blood by-products. The Florida Commission on Human Relations rejected the company's contention that AIDS was easily transmissable in the workplace. Shuttleworth v. Broward County, supra, FCHR Dec. No. 85-0624.

1. Information Raytheon Received Regarding AIDS in 1984

On January 16, 1984, Dr. Hosea, an expert in infectious diseases and a doctor who treats persons with AIDS who was Complainant's personal physician wrote Raytheon regarding Chadbourne's condition. In pertinent part, Dr. Hosea wrote:

> "Of note is that there have been no cases of acquired immunity deficienty syndrome in close contacts of patients with AIDS. It seems like this disease can only be transmitted by blood transfusions, sharing of intraveneous needles or sexual contact.

(Exh. 5; Exh. 2 pp. 12, 15, 18, 31 : RT III 536-537, 9-25, 1-6.)

In January, 1984, Dr. Donald and Dr. Hosea had spoken by telephone. In that conversation, Dr. Hosea had assured Dr. Donald that there was no evidence that AIDS could be transmitted

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casually (RT I 143-144, 12-25, 1-17).

Dr. Juels, epidemiologist at Santa Barbara County Health Department, had also written Raytheon on January 13, 1984. In his letter, Dr. Juels stated:

> "Enclosed is a statement about AIDS issued by the Department of Health and Human Services in August, 1983. As indicated in the passage I underlined, AIDS is believed to be transmitted only through sexual contact, blood or blood products. Casual social contact, family contact (other than sexual) as well as occupational contact in health care settings (physicians and nurses caring for AIDS patients) have not been implicated in the transmission of AIDS.
>
> Therefore, contact of employees to an AIDS appears to pose no risk from all evidence accummulated to date."

(Exh. 17 : RT III 439-441, 8-25, 1-25, 1-3; RT V 909, 11-16.)

Dr. Juels also attached a newsletter from the Department of Health and Human Services issued in August, 1983. The newsletter said:

> "How contagious is AIDS?
> No cases have been found to date where AIDS has been transmitted by casual or even close daily contact with AIDS patients or persons in the high risk groups. For instance, family members other than sex partners of AIDS victims have not developed AIDS. Ambulance drivers, police, and firemen who have offered emergency assistance to AIDS patients have not fallen ill. Nurses, doctors, and health care personnel have not developed

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> AIDS from exposure to AIDS patients.
>
> Although other diseases may be transmitted through saliva, there is no evidence that AIDS is transmitted by sweat or saliva.
>
> However, health care providers and laboratory workers should follow careful procedures when handling any blood and tissue samples from patients with potentially transmissible disease, including AIDS."

(Exh. H : RT V 909-910, 17-25, 9-12.)

On January 25, 1984, Nurse Heybl and Dr. Donald met with Dr. Juels regarding Chadbourne's condition. During that meeting, Dr. Juels informed Dr. Donald and Nurse Heybl that Chadbourne's condition posed no health threat to other employees at Raytheon since AIDS is only transmitted through blood and blood by-products by sexual intercourse, blood transfusions and sharing of intravenous needles. After viewing where Chadbourne actually worked, Dr. Juels still felt Chadbourne's condition pose no health threat to Raytheon's employees. (RT 433-436, 473-474, 570-573, 10-25, 1-25, 1-16, 18-25, 1, 1-25, 1-22, RT V 917-918, 11-25, 1-5 : Exh. 19.)

On February 10, 1984, Dr. Juels again wrote Raytheon. He said:

> A couple of days ago I talked with Irene Heindl, MD, a physician who works with the State of California VD control program. She stated that she and the State's infectious disease control staff agree with CDC's position on the

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> communicability of AIDS. According to her, the State, and CDC, as well as myself, AIDS is transmitted via very close personal contact, such as sexual activity, and through the use of blood products or sharing needles during illicit use of drugs. Casual social contact, as would occur in an occupational setting, poses no risk of transmission, according to all available data and the opinions of experts."

(Exh. 18 : RT III 441-445, 7-23, 8-23; RT V 928, 1-15.)

In January, 1984, Nurse Heybl contacted the CDC in Atlanta, Georgia. Nurse Heybl spoke with Dr. Kastro, who informed her that AIDS cannot be transmitted through casual contact such as exists in the workplace (RT V 926-927, 945, 2-25, 1-21, 1-24 : Exh. 20).

In 1984, Dr. Donald and Nurse Heybl reviewed newspapers and periodicals, as well as medical literature regarding AIDS. They reviewed the following MMWRs (March 4, 1983):

> "No AIDS cases have been documented among health care or laboratory personnel caring for AIDS patients or processing laboratory specimens. To date, no person-to-person transmission has been identified other than through intimate contact or blood transfusion. (Exh. I, Exh. 12, Exh. I-A.)

(September 2, 1983):

> "Acquired immunodefieciency syndrome (AIDS) was first recognized in 1981. The epidemiology of AIDS is consistent with the hypothesis that it is caused by a

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> transmissible infectious agent (1-3). AIDS appears to be transmitted by intimate sexual contact or by percutaneous inoculation of blood or blood products. There has been no evidence of transmission by casual contact or airborne spread, nor have been cases of AIDS in health-care or laboratory personnel that can be definitely ascribed to specific occupational exposures. (Footnote omitted.) (Exh. I-A.)

(September 9, 1983):

> Eighty-nine percent of patients with AIDS can be placed in groups that suggest a possible means of disease acquisition: 71% are men with homosexual or bisexual orientations; 17% (including 51% of the women) have used intravenous (IV) drugs; and 1% are hemophiliacs. Of the other 11% of cases, means of disease acquisition is less clear, but in none of these cases does casual contact appear to be involved. This group of 11% includes cases for whom information about risk factors is either absent or incomplete (3% of total), and others whose risk and exposure factors are under investigation. The latter includes patients who were born in Haiti but are now living the United States (5% of total). Also under investigation are heterosexual partners of persons with AIDS or persons at increased risk of AIDS (1% of total), and those exposed to blood transfusions (1% of total). Finally, some thoroughly investigated cases belong to none of the above groups (1% of total).
>
> AIDS cases have been classified

> into groups at greatest risk of acquiring the disease. Classification of certain groups as being more closely associated with the disease has been misconstrued by some to mean these groups are likely to transmit the disease through non-intimate interactions. This view is not justified by available data. Nonetheless, it has been used unfairly as a basis for social and economic discrimination.
>
> The occurrence of AIDS cases among homosexual men, IV drug abusers, persons with hemophilia, sexual partners of members of these groups, and recipients of blood transfusions is consistent with the hypothesis that AIDS is caused by an agent that is transmitted sexually or, less commonly, through contaminated needles or blood. About 91% percent of reported cases have occurred in these patient groups. Among the remaining cases, there has been no evidence that the disease was acquired through casual contact with AIDS patients or with persons in population groups with an increased incidence of AIDS. AIDS is not known to be transmitted through food, water, air, or environmental surfaces. (Footnote omitted; underlined for emphasis.) (Exh. III; Exh. I-A.)

(July 13, 1984):[13]/

> Until the usefulness of positive and negative serologic tests is fully established, all individuals in populations with

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[13]/ There was no MMWR issued on June 26, 1984, regarding AIDS (Exh. I-A).

> increased incidences of AIDS, as well as those outside such groups with positive tests, should comply with the March 1983 Public Health Service recommendations for the prevention ofAIDS to minimize the tranmission of the syndrome (16). Abstention from IV drug usage and reduction of needle-sharing and other use of contaminated needles by IV drug users should also be effective in preventing transmission of the virus and of AIDS. There remains no evidence of transmission of AIDS through casual contact. Prevention measures should stress that transmission has been only through intimate sexual contact, sharing of contaminated needles, or, less frequently, through transfusion of blood or blood products. (Underlined for emphasis.) (Exh. 14; Exh. I-A.)

They reviewed a Food and Drug Administration Bulletin published by the United States Department of Health and Human Services in August, 1983, which said:

> AIDS has been seen predominantly in male homosexuals with multiple sexual partners, Haitian immigrants, and intravenous drug abusers. Because I.V. drug abusers are at high risk, it must be presumed that AIDS can be transmitted by exposure to contaminated needles. This underscores the importance of exercising caution in handling needles. AIDS has also been seen less commonly in persons with hemophilia A and very rarely in individuals receiving blood transfusions. There have also been reports of AIDS in sexual contacts of AIDS patients or persons at high risk for AIDS. Casual contact has not been reported to cause AIDS. Four cases have been reported in health-care personnel who were found not to have risk factors for AIDS. However, there was no evidence that these individuals acquired the syndrome through exposure in the hospital."

(Footnotes omitted. Underlined for emphasis.)

Dr. Donald and Nurse Heyble reviewed several articles directed at health care professionals who may come into contact with persons with AIDS. These articles conclude that spread of AIDS through casual contact is not the manner in which the syndrome is transmitted. These articles do not state that co-workers of a person with AIDS run any risk of infection. (Exh. I-A, items numbered 3, 4, 8-11, 13, 17-18; Exh. I-B, item numbered 9.)

The remainder of the written material relied on by Respondent in 1984, consists of articles from newspapers and magazines regarding AIDS. These articles are not the type of material which experts normally rely on and should be accorded no weight at all. Luque v. McLean (1972) 8 Cal. 3d 136; Cal. Evid. Code, section 801, subd. (b). In short, Respondent did not prove by preponderance of the evidence available in 1984, that Chadbourne's condition posed a significantly greater risk of infection to his co-workers.

Respondent next argues that 5 percent of persons afflicted with AIDS fall outside of the high risk

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groups.[14]/ Respondent contends this 5 percent demonstrates that AIDS must be transmitted from contact other than blood and/or semen and thus, AIDS could be acquired by casual contact.

Respondent's argument is without merit. Pespondent has not carried its burden in proving that AIDS can in fact be transmited casually in a manner which would present a "significantly greater danger" to Chadbourne's co-workers.

The 5 percent of persons afflicted with AIDS who fall outside the high risk groups have not acquired AIDS through casual contact. Experts testified that the 5 percent figure is exaggerated. The 5 percent figure includes persons with AIDS of whom there was not sufficient information to determine whether or not they are members of a high-risk group. They then, must be classified by the CDC in a group outside of the high-risk groups, but that does not necessarily mean that they do not fall without the high-risk groups or that such persons acquired AIDS by casual means. In fact, it is likely that this 5 percent of persons are within the high-risk groups. (Exh. A : RT I 89, 114-115, 155, 6-19, 8-25, 1-2, 7-11, 17-25; RT II 212- 213, 229, 265-267, 309-310, 22-25, 1-12, 3-15, 319-320, 17-25, 1-25, 1-15, 3-25, 1-8, 10-25, 1-4.) The figure is difficult to assess because

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[14]/ Groups at highest risk of acquiring AIDS - homosexual or bisexual men, intravenous drug abusers, recipients of contaminated blood, sexual contact of persons infected with the AIDS virus (hereafter HTLV-111/LAV), and children born to mothers infected with HTLV-111/LAV. (MMWR, August 30, 1985; RT I 30-31, 41-42, 20-25, 1, 22-25, 1; Exh. II; Exh. III; Exh. VII : RT II 225-259, 15-25, 1-25, 1-14.)

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in order to know whether a person with AIDS falls inside a high risk group, that person must admit that he is gay, bisexual, or an intravenous drug user, life styles which carry a stigma in our society. (RT I 117, 10-16; RT II 212-214, 265-267, 309-310, 22-25, 1-25, 1, 17-25, 1-25, 1-5, 7-25, 1-8; RT III 457, 2-7; RT VIII 1343-1344, 16-25, 1-15.)

All the experts who testified stated that their patients with AIDS or AIDS-related conditions[15]/ fall within the high-risk groups. (RT I 90, 156, 12-16, 3-9; RT VIII 1344, 16-22; RT VI 1068, 12-15.) Experts also testified that if AIDS were indeed spread by casual contact, then there would be no high-risk groups contactingthe syndrome, all people would be at risk, not just the high-risk groups. Such is not the case because AIDS is not spread casually. (RT I 113-114, 190-191, 13-25, 1-7, 14-17, 24-25, 1-2; Rt II 267, 7-15).

Respondent's use of a small figure of persons afflicted with AIDS who are outside of the high-risk groups is not persuasive that AIDS is transmitted by casual contact. Respondent did not carry its burden.

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[15]/ AIDS-related conditions include AIDS-related complex (hereinafter referred to as "ARC") persons who are ill but do not have AIDS and persons who have HTLV-111 virus but do not have AIDS (RT III 413-414, 2-25, 1-7).

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2. Information Regarding AIDS Available to Respondent in 1984

Respondent contends in 1984 medical knowledge regarding AIDS was insufficient for an employer to determine what was the risk of infection to employees if they were exposed to someone who had AIDS. Respondent's argument is without substance. As early as 1983, a case brought by prisoners against New York Department of Correctional Services found AIDS was not casually transmitted. La Rocca v. Dalsheim (1983) 467 N.Y. Supp. 2d 302.

In 1984, the level of medical knowledge about AIDS was such that the Santa Barbara County Health Department, the CDC, Chadbourne's private physician, and Raytheon's doctor all recommended that Chadbourne be allowed to return to his former position at Raytheon (Exh. 19, see pp. 16-19). The literature reviewed by Raytheon in 1984, supports the recommendation. (See pp. 16-23).

Experts agreed that enough information was known about AIDS in 1984 by the medical community to indicate that AIDS was not spread by casual means. (Exhs. I-IV : RT I 33, 11-18.) For example, in March, 1983, the MMWR[16]/ reported that no AIDS cases had been documented among health care nor laboratory personnel caring for AIDS patients or processing laboratory specimens which would indicate that in 1983, casual contact with person

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16/ The Report contains recommended guideline for health care workers which do not urge extraordinary safety measures when health care workers are not in contact with AIDS' patients' bodily fluids.

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with AIDS did transmit the syndrome (Exh. I : RT I 33, 11-18).

Although it was not announced in the United States that the virus was isolated until the Spring of 1984, the medical community believed AIDS was caused by an infectious agent such as a virus before 1984. As early as 1982, the CDC had ruled out casual transmission of AIDS. (Exhs. I-III : Rt I 35-37, 65, 96, 111, 123, 16-25, 12-24, 2-21, 11-17, 8-18, 17-25, RT II 209, 224-225, 260, 285-286, 303-304, 425,18-23, 12-25, 1-3, 13-24, 7-25, 1-5, 25, 1-25, 1-15; Exh. 11 : RT 410-411, 12-25, 1-16 : Exh. 12.)

Respondent implies, but did not prove that there was insufficient data available in 1984, to indicate that AIDS was not spread by casual contact. Respondent did not prove by preponderance of the evidence its affirmative defense.

It is important to note the steps Raytheon did not take when it was determining whether or not it would reinstate Chadbourne. The company never hired a consultant or medical expert during the relevant time period. Instead, the company relied upon the opinion of its own doctors whose background in epidemiology and infectious disease in general and AIDS in particular was woefully inadequate.[17]/ (RT III 578-581, 14-25, 24-25, 1-25, 1-2 : Exh. AA.)

Although Raytheon knew Chadbourne had a fatal condition, it set up no timetable as to when it would decide whether or not Chadbourne could be reinstated. (RT VI 11-49, 9-11.) The

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17/ Raytheon even ignored the opinion of it own doctors. (Exh. 19.)

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company refused to conduct a training of its employees regarding AIDS, even though such a training had been offered. (RT V 961, 13-25.) To date, Raytheon still does not have a policy regarding AIDS. (RT VI 1161-1162, 25, 1-2.) The company never gave Chadbourne a full medical examination to determine whether or not he posed any risk of infection to others.[4] (See fn. 6.)

The record clearly shows Raytheon had an occupational nurse research the vital issue as to whether or not Chadbourne posed any risk of infection to other employees. The company then ignored the advice of the CDC, the Santa Barbara County Health Department, their own doctor, Chadbourne's doctor and stalled for time. Time was on the company's side and Chadbourne died without being allowed to return to work.

3. Information Regarding AIDS Available to Respondent from 1985 Until the Present

Knowledge about the transmission of AIDS since 1985 cannot be relied upon by Raytheon because Raytheon did not use such knowledge in its decision not to allow Chadbourne to return to work. Only information used by Raytheon during 1984 is relevant in the instant case. Assuming arguendo, that Raytheon is allowed to use such testimony and material, Raytheon still has not carried its burden by demonstrating Chadbourne posed a "significantly greater" risk of infection than other employees who did not have AIDS.

Raytheon's review of material in 1985, until the time of the hearing does not support the theory that AIDS is spread by

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casual transmission. In fact, material relied on by Raytheon is persuasive that AID is not transmitted by casual contact. In MMWR dated January 11, 1985:

> "Epidemiologic data suggest that the virus has been transmitted through intimate sexual contact; sharing contaminated needles; transfusion of whole blood, blood cellular components, plasma, or clotting factor concentrates that have not been heat treated, or from infected mother to child before, at, or shortly after the time of birth. No other products prepared from blood (e.g. immunoglobulin, albumin, plasma protein fraction, hepatitis-B vaccine) have been implicated, nor have cases been documented to occur through such common exposures as sharing meals, sneezing or coughing, or other casual contact."

(Exhs. I-A, I-B.) (Underlined for emphasis.)

In "Facts About Aids" published by the Department of Health and Human Services in 1985, the Department of Health and Human Services stated:

> "No cases have been found where AIDS has been transmitted by casual contact with AIDS patients or persons in the high risk groups. Ambulance drivers, police, and firemen who have assisted AIDS patients have not become ill. Nurses, doctors, and health care personnel have not developed AIDS from exposure to AIDS patients.
>
> However, health care and laboratory workers should follow careful procedures when handling blood and tissue samples from patients with potentially transmissible

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diseases, including AIDS."

(Exh. I-A.)

The remaining articles which Respondent relied on in 1985, are from newspapers and magazines. Such material should not be given any weight. Luque v. Mclean, supra, 8 Cal. 3d 136.

Respondent also relies on the testimony of three experts[18]/ to support their affirmative defense that Chadbourne posed a "significantly greater" risk of infection than other employees. Raytheon's experts should be accorded no weight or little weight because they had little or no experience with persons with AIDS nor did they possess the medical qualifications of the Department's and Complainant's expert witnesses .

a. Frank R. Cox, PH.D.

Dr. Cox is a professor of psychology at Santa Barbara City College. He has written books on marriage and family. He has never treated persons with AIDS. He has no medical background. he is not qualified to render any opinion regarding the epidemiology of AIDS or its affect on people. (RT II 342-344, 359-361, 23-25, 1, 10-14, 3-16, 19-21, 6-15.)

b. R. S. Mendelsohn, M.D.

Dr. Mendelsohn is a pediatrician. He has written several books, which by his own admission, place him outside of the medical establishment.[19]/ He has not treated anyone with AIDS nor been involved with AIDS research. He is not an epidemiologist nor certified in infectious disease.

Dr. Mendelsohn does not recognize that AIDS is caused by the HTLV-III virus.[20]/ He couldn't even define the term "casual contact." He felt AIDS could be transmitted by being in the same room with someone who had AIDS, although he could cite no documented cases which supported his theory. Dr. Mendelsohn feels persons afflicted with AIDS should be isolated from society.

Dr. Mendelsohn did not know what are the high-risk groups which are most likely to acquire AIDS. He couldn't remember the number of people involved nor when the CDC conducted the studies of families living with persons who have AIDS (hereafter "family studies). He didn't know the names of the tests which indicate the presence of HTLV-III virus in the blood. The didn't know how the tests were administered. He didn't even know when the AIDS virus was first isolated or who isolated the virus. He didn't know the symptoms of Kaposi sarcoma or what

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18/ Interestingly, Peter R. Wolfe, M.D. who originally was scheduled to testify on behalf of the Respondent, testified instead for the Department.

19/ Dr. Mendelsohn does not believe in modern medicine, doctors, hospitals, birth control, immunization and floridization (RT VI 684-686, 738-740, 17-20, 7-12,25, 1-3, 25, 1-2, 19-25, 1).

20/ He also does not recognize the scientific community's acceptance of the causes of lung cancer. He thought it is possible that a person might catch lung cancer by standing in same room with someone who has lung cancer (RT IV 728-729, 14-23, 6-23).

percentage of persons with AIDS have this form of cancer. (RT IV 628, 635, 640-642, 670, 674, 676, 700, 705, 707-710, 714-716, 726, 734-735, 751-752, 756-757, 13-16, 9-25, 4-8, 25, 1, 5-13, 19-25, 6-14, 11-12, 8-11, 13-18, 23-25, 1-5, 16-21, 24-25, 1-9, 19-25, 1-4, 14-17, 7-22, 17-18, 17-25, 1-2, 18-25, 1-5, 23-25, 1-3 : Exh. L.)

Dr. Mendelsohn relies on confusing material to support his testimony that AIDS is transmitted by casual means. The material does not support such a theory. He offered no scientific data to support his theory. The material at best seems to imply that different bodies are dealng with aspects of AIDS in different manners.

For example, the fact that Connecticut plans to isolate prisoners with ARC bears no relevance to the issue at hand of AIDS in the workplace. Prisons are places where there are high instances of violence, traumatic sex, and homosexual activity, perhaps coerced sex. Isolation procedures in a prison population of person with ARC may be reasonable but not relevant as to whether or not Chadbourne should have been allowed to return to work at Raytheon. (Exh. P.) Or the fact that the military may screen its personnel for AIDS may be reasonable given that military personnel may have to donate blood to other military personnel in the field on an emergency basis. (Exh. O.) The battlefield or the prison is a very different context from the workplace at issue in this case. Dr. Mendelsohn's testimony and evidence offered by him should not be given any weight or little weight by the trier of fact.

d. S. A. Armentrout, M.D.

Dr. Armentrout is a professor of medicine at the University of California, Irvine Medical School (hereafrrer U.C.I. Medical School). He is a practicing physician. He is chief of the division of hematology and oncology at U.C.I. medical school.[21]/ (RT VI 1005, 6-11 : Exh. 2.)

He has treated between 25-100 persons with AIDS. (RT VI 1017-1018, 20-25, 1-2.) Dr. Armentrout testified that 7 to 10 percent of the cases of AIDS fall outside the well-known high risk groups.[22]/ he did not specify what source he drew this figure or what period of time he was using (RT VI 1023, 1025-1026, 19-22, 13-25, 1-11). Dr. Armentrout testified that the 7 to 10 percent of AIDS cases outside the known risk groups must mean that there is some other mode of transmission of AIDS other than semen, blood or blood-by product. The Department already discussed this issue previously. (See pp. 23-25.)

Dr. Armentrout also testified that there was not sufficient information known about AIDS in 1984 for anyone to know what was the risk of infection of a person with AIDS in the workplace. (RT VI 1033, 13-22.) The Department has previously discussed Respondent's argument. (See pp. 26-28.) Although Dr. Armentrout stated that an employee with AIDS should not return to work due to possible risk of infecting others, he did not qualify

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[21]/ Hematology is the study of disease of the blood. Oncology is the study or the treatment of cancer (RT VI 1006, 7-14).

[22]/ All other experts testified the figure is approximately 5 percent (See pp. 23-25.)

his view nor know the facts of the case.

Dr. Armentrout could not cite one documented case whereby a person caught AIDS through casual contact. (RT VI 1051, 20-22.) He couldn't specify the degree of risk other employees faced if a person with AIDS worked amongst them. (RT VI 1056, 1-3.) He didn't know Chadbourne's name or his work duties. (RT VI 1057, 18-20, 24-25.) He didn't know how much contact Chadbourne had with other employees. (RT VI 1058, 1-3.) He hadn't even visited the workplace in question. (RT VI 1058, 4-10.) Finally, Dr. Armentrout could cite no source for his view that casual transmission of AIDS might occur.

Dr. Armentrout's testimony should be given little weight or no weight at all because of his limited knowledge and experience in the field, his uncertainty of Chadbourne's degree of risk to other workers and his lack of scientific sources.

In short, Respondent has not met its burden.

III

AIDS IS NOT CASUALLY TRANSMITTED

Assuming that Respondent has met its burden, the Department and Complainant can rebut any implication that AIDS is casually transmitted by the overwhelming evidence regarding the transmission of AIDS and the testimony and qualifications of the Department's and Complainant's expert witnesses. In November, 1985, the CDC issued guidelines for employers regarding AIDS in the workplace. The Report stressed AIDS is not casually transmitted. (MMWR November 15, 1985.)

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1. Neil R. Schram, M.D.

Dr. Schram is an internist. His background in AIDS is extensive. He is chairman of the Los Angeles/County AIDS Task Force since 1984. (Exh. 3 : RT I 27-30, 17-21, 22-25, 1-4, 3-10.) Dr. Schram has often lectured on AIDS. (RT I 30, 78, 9-14.) Dr. Schram attended a medical conference presented by the CDC in October, 1985, to serve as a consultant in drawing up employment quidelines regarding employees who have AIDS. (RT I 55, 17-22.)

Dr. Schram has treated approximately 43 patients with AIDS or AIDS-related conditions since 1983. (RT I 64-65, 15-22, 1.) Eighty percent of Dr. Schram's practice deals with AIDS. (RT I 112,14-23.)

Based on his background and experience, his reading of the relevant medical literature, Dr. Schram testified that AIDS is transmitted by intimate sexual conduct and by blood. (RT I 30, 13-16 : Exhs. I-X.) Dr. Schram stressed the importance of the health care and family studies. As early as March, 1983, the CDC reported that no cases of AIDS have been documented any health care workers. (Exh. I.) In 1984, the CDC found that 51 health care workers who had been exposed to AIDS patients' bodily fluids by needle stick injuries, cuts, etc. did not have AIDS. (Exh. IV.) In 1985, the British Medical Journal released a study that demonstrated 68 health care workers who cared for AIDS patients had not tested positive for the HTLV-III antibody. (Exh. VIII : RT I 49-50, 24-25, 1-14.) In 1985, the CDC again reported out of 1758 health care workers who had cared for AIDS

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patients, only 26 tested positive for the AIDS antibody. Only 3 of the 26 workers did not belong to high-risk groups. Information was not available on 1 of the 3 persons. As to the remaining 2 people, they had both had needle stick injuries from 2 different AIDS patients. (Exh. IV : RT I 51-52, 22-25, 1-15.) This finding indicates that if people who work directly with AIDS patients and come into contact with their bodily fluids do not catch AIDS then co-workers of persons with AIDS who have no contact with a person's semen, blood and blood-by products have no risk of infection.[23]/

In 1985, the Journal of American Medical Association found that family members who lived with persons with AIDS did not catch AIDS. (Exh. V.) In 1985, the CDC found that none of the family members of over 12,000 persons with AIDS did not have AIDS. In particular, the CDC monitored 6 studies of family members of person with AIDS. Not one of those persons had the HTLV-111 virus. (Exh. VII : RT I 47, 6-25.) Another study reported that grandmothers and foster mothers of children with AIDS, who had cared for these children since infancy were not infected by the AIDS virus.[24]/ (Exh. X : RT I 53-54,

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[23]/ In 1983, the CDC found no cases of AIDS among friends, relatives and co-workers of persons with AIDS suggesting no risk of infection of casual contact. (Exh. II.)

[24]/ Although AIDS has a long incubation period, the anti-bodies of the AIDS virus develop within a week to a month. So the tests for anti-bodies is important in being able to determine if someone is going to develop AIDS. -(RT I 95, 3-10.)

18-25, 1-11.) These studies[25]/ are important because if a person does not catch AIDS from their infected family member with whom they share meals, drinking glasses, bathroom facilities, hugs, kisses, clothing and bed, then it can be assumed that AIDS will not be spread in the less intimate atmosphere of the workplace. (RT I 45-46, 48, 56, 14-25, 1-2, 1-14, 16-25, 1-14.)

Dr. Schram stressed that the 1984, 1985 studies merely confirmed what had been reported in 1983 regarding the transmission of AIDS. (RT I 50, 15-22.)

Dr. Schram also stated that he examines persons with AIDS and that where he is not going to come into direct contact with his blood or blood secretions he does not wear gloves, masks or gowns. This policy applies to nurses in his office as well. His AIDS patients wait in the waiting room and when they are hospitalized they are not kept in isolation except for blood and body fluid precautions. He testified he would not put himself, his staff and his other non-AIDS patients at risk if there was any real chance that AIDS was spread casually. (RT I 63-64, 10-25, 1-6.)

Regarding whether or not people with AIDS should stop working, Dr. Scharm stated:

> A. I have never recommended that they discontinue employment. I certainly have recommended that they

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[25]/ These studies exclude sexual partners and children born to persons with AIDS.

go on periods of disability. But I feel strongly that people with AIDS should return to work when they are able to. I think that is an extremely important part of their overall well-being.

Q. And why do you say that?

A. I think survival. We are dealing with a disease where we are telling people they are going to die. People with AIDS read in the media every day that AIDS is a hundred percent fatal. That's a terrible thing to tell people. Some people have lived four, five, six years with AIDS. There's no reason that they should not work.

Emotionally, it is of extreme importance for them to work. Many people have been deserted by their family, friends and loved ones. To have them also not be allowed to return to work is just devastating.

Dr. Schram stated there has not been one documented case of someone acquiring AIDS by being in the same room with, working with, shaking hands with, riding a bus with, touching the same door handle as, sharing meals, cups, bathroom facilities, swimming pool, hot tub or by eating food prepared by someone who has AIDS. (RT I 76-77, 1-25.)

The fact that the AIDS virus has been found in tears and saliva does not indicate that AIDS is transmitted casually. (RT I 99-100, 105, 14-25, 1-13, 10-12.) The amount of the virus found in saliva is very samll. Even assuming the virus is alive in the saliva outside the body for a short period of time that saliva would have to come in contact with an open wound to get into a body's white blood cell in order to represent a potential problem. (RT I 108-109, 116, 9-25, 1-11, 2-19.) Once again the family and health care studies would have pointed out such a risk of infection, if, indeed there is a risk. The studies do not indicate AIDS is transmitted via saliva. For example, Hepatitis-A is spread by saliva. Family members living with persons with hepatitis-A do catch hepatitis-A. (RT I 113-114, 20-25, 1-7.)

2. Stephen Wayne Hosea, M.D.

Dr. Hosea specializes in infectious disease.[26]/

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[26]/ Infectious disease study is the spread, diagnosis and therapy of various kinds of infection. (RT I 126-127, 25, 1.)

He graduated from Harvard College and Harvard Medical School. He served as a fellow doctor at the National Institute of Health. He is certified by the Board of Infectious Disease and a member of the Infectious Disease Society. He is an Associate Clinical Professor at the University of Southern California at Cottage Hospital in Santa Barbara. (RT I 125-128, 22-25, 1-25, 1-21, Ex. 4.)

Dr. Hosea has treated most of AIDS cases in Santa Barbara County. Dr. Hosea testified that AIDS is transmitted by sexual contact or blood or blood-by products. (RT I 135, 10-19.) Dr. Hosea based his opinion on the transmission of AIDS on his medical background, experience and relevant scientific literature. (RT I 136, 18-23.)

3. Martin Finn, M.D.

Dr. Finn is the Medical Director of Public Health for the County of Los Angeles. He is board certified in preventive medicine since 1971. He has been an Assistant Clinical Professor of Medicine at the University of Southern California, School of Medicine, Department of Community Medicine since 1973. (Exh. 7.)

Dr. Finn has been involved with AIDS since 1981, as the first cases were reported by Dr. Michael Gotlieb. He is a member of the State AIDS Task Force. He is a board member of the AIDS Project. He is Chairman of the Board for the AIDS Project since 1984. He is a member of the Los Angeles County Department of Health Services Task Force on AIDS, the Los Angeles City/County

Task Force on AIDS and the U.S. Conference of Mayors Task Force on AIDS. (Exh. 7 : RT I 178, 2-12.)

Dr. Finn has lectured on AIDS on several occasions throughout Los Angeles and San Diego County. He has attended many conferences regarding AIDS. As Medical Director of Public Health for the County of Los Angeles, Dr. Finn has directed medical research of AIDS. His office submits data regarding AIDS to the CDC. He is in frequent and direct contact with the CDC. (RT I 178-179, 13-25, 1-11.) He has worked with many AIDS patients. Dr. Finn spends approximately 60 percent of his time on AIDS. (RT I, 180-181, 6-9, 14-19.)[27]

Dr. Finn testified AIDS is transmitted through sexual activity and blood and blood by-products. AIDS is not, according to Dr. Finn spread casually, based on his experience, background and reaching of relevant literature. (RT I 179, 12-19.)

The County of Los Angeles Department of Health Services has a policy of allowing person with AIDS to return to work since 1983. (RT I 186, 1-13.)

Dr. Finn stressed the importance of the family studies done bythe CDC in demonstrating the manner by which AIDS can be transmitted. He said the studies found:

> "There were five basic studies, which I believe the number was 230 total. They reviewed the habits of individuals who were

---

[27]/ Los Angeles has the third largest group of persons with AIDS in the United States. (RT II 208, 22-24.)

> family members of those with AIDS, including such things as the sharing toothbrushes, sharing of razors, feeding of the patients, caring of the patient, bating the patient and those things. Very, very close activities even in terms of the sharing of very intimate utensils, if you want to put it that way. And the reports were that none of the 230 had become positive for the HTLV-III antibody." (RT I 191, 8-19.)

Dr. Finn emphasizes the potential for transmission of AIDS is much greater in hospitals and by dentists as compared to most settings where casual contact occurs. (RT II 232, 8-17.) Thus, if health care workers and family members have not contacted AIDS via their close contact with persons with AIDS then it is clear AIDS is not spread in the settings of most work environments.

4. Shirley Fannin,M.D.

Dr. Fannin is an Epidemiologist and Associate Deputy Director of Communicable Disease Control Programs for Public Health in Los Angeles County. She is a member of several professional societies including the American Public Health Association, Academy of Preventive Medicine and the Southern California Public health Association. She is affiliated with Cedars-Sinai Medical Center in Los Angeles. (RT II 244-245, 21-25, 1-25 : Exh. 9.)

Dr. Fannin's background in AIDS is extensive. She described the first three cases of AIDS in Los Angeles in 1981. She is currently serving on the AIDS Task Force in Los Angeles. (RT II 248-249, 18-25, 1-25 : Exh. 9.) She has been consulted on AIDS by the District Attorney's Office, City Attorney Office, Public School Systems, private companies and numerous other agencies. (RT II 251-252, 22-25, 1-14.) She was consulted by the City Attorney's office for the Los Angeles Anti-Aids Discrimination Ordinance. (RT II 276, 12-18.) Dr. Fannin's office submits data directly to the CDC on AIDS. She has lectured numerous times on AIDS, been published on the subject and attended many conferences and seminars regarding AIDS. (RT II 15-25, 1-13.) Dr. Fannin has interviewed approximately 50 persons with AIDS. (RT II 259-260, 18-19, 2-3.)

Epidemiology is very important in the study of AIDS because as Dr. Fannin explained:

> "Well, in the study of AIDS the epidemiology of AIDS is the most advance of any of the areas of inquiry. It was through those studies that we were able to determine that it was a transmissible agent before isolating that agent.
>
> Because of the distribution of the disease, the characteristic distribution of the disease, we were also able to tell about its transmission because of the principles of epidemiology and because of the observations being made on an increasing number of cases.
>
> We started out with our five cases. We added to that. Within four or five months, there were 70-some cases known from around the United States. It was observations on those cases that helped us determine, one, that it was not a chemical or a drug, and that it was

likely to be a transmissible agent." (RT II 250, 4-21.)

Based on her experience, background, reading of the relevant literature, Dr. Fannin testified that AIDS is transmitted by blood, blood by-products and sexual contact. AIDS is not transmitted by casual contact. She said she takes no precautions herself in face-to-face interviews of persons with AIDS. (RT II 260, 262, 4-8, 9-22.) She stated there has been no documented cases of someone acquiring AIDS by merely working with someone who has AIDS. (RT II 12-16.)

Dr. Fannin shared Dr. Schram's view that it is important for the well-being of persons with AIDS that they keep involved with day-to-day activity. (RT II 273, 9-24.)

Dr. Fannin stressed AIDS is similar to hepatitis-B in that its a blood-borne disease affecting the same high-risk groups. Hepatitis-B is more contagious than AIDS. (RT II 274, 5-9.) Hepatitis-B has been around longer and medical science has had much experience with it. Persons with hepatitis-B are all allowed to resume employment except in rare circumstances where there is a sharing of blood or blood by-products at their place of employment. (RT II 274-275, 1-25, 1-19.)[28]

Dr. Fannin felt strongly about discrimination against persons with AIDS in the workplace. She recommended Los Angeles

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[28] Although hepatitis-B is less fatal than AIDS, many persons die of the secondary effects of hepatitis-B such as liver cancer. (RT II 286, 8-22.)

pass an Anti-AIDS Discrimination Ordinance:[29]

> "Well, basically, recommendations were that individuals has had a diagnosis of AIDS, because that was more frequently causing discrimination, should not be discriminated, institutionally discriminated against, because there was no supporting evidence for the irrational fears that were occurring. There was no supporting evidence for those fears.
>
> And we were running into frequent problems with individuals, in both the person being discriminated against and the person doing the discriminating, who were calling our office, and the fear in the housing, for instance, was that somebody would catch it from the elevator button that an AIDS patient pushed as they went to their apartment, or that having the AIDS patient knock on their door or talk to them.
>
> Way out of line.
>
> With employment, we have run into, on several occasions, persons who has been dismissed, not on the basis of their inability to do the job they were doing, but sometimes even on the basis of gossip where the employer did not even have a verification that they had the disease, but on the basis of gossip. And they would just say, "I heard you have AIDS." Whissshh, whissshh, whissshh, "Goodby."
>
> That's where the ordinance really came about, is to say there is no reason to institutionally

---

[29] Los Angeles passed such an ordinace in 1985.

discriminate against these people. Social discrimination we cannot stop.[30] But we can stop institutional discrimination. (RT II 277-279, 23-25, 1-25, 1-3.)

Dr. Fannin pointed out that the health care and family studies indicate AIDS cannot be transmitted by casual contact. (RT II 280-285, 3-25, 1-25, 1-6.)

Dr. Fannin stated that AIDS virus is fragile.[31] It does not survive or reproduce outside the body. Household cleaning detergents would kill it. (RT II 297, 303-303, 7-14, 20-25, 1-24.) This evidence adds to the growing body of knowledge finding AIDS is not spread by casual contact.

Dr. Fannin was given the following hypothetical:

> "Doctor, I'm now going to ask you another question and to assume facts that are true. I will then ask your opinion based on these facts. Assume that a young man has been working for a large defense firm since 1980. In 1983, he's diagnosed as having AIDS. He's a quality control analyst and has little or no contact with the public. He has casual contact with his co-workers. Do these co-workers run a risk of catching AIDS?" (RT II 333-334, 16-25, 1-2.)

---

[30] Dr. Fannin didn't feel anyone could control individual discrimination against persons with AIDS such as not wanting someone with AIDS to come over to your home to have dinner. (RT II 279, 9-19.)

[31] As opposed to a hardy virus like the smallpox virus which can survive outside the body for 6 months and is resistant to ordinary antiseptics. (RT II 339-340, 11-25, 1-6.)

She replied:

> "I say "no" because, from my understanding of what a person in that job does, and the type of contact that they would have with other employees, the two requirements for transmission - which we believe are requirements for transmission - would not be met.
>
> One is close, intimate sexual contact, like sexual contact and exchange of blood or blood products." (RT II 334, 8-16.)

5. Charles W. Juels, M.D.

Dr. Juels is an epidemiologist. He has a masters degree in public health from the University of California at Berkeley. He worked for 2 years as an epidemiologist for the Infectious Disease section at the California State Health Department, which is equivalent to the CDC at the state level. He also served as an epidemiologist for the United States Navy. He was the Director of Public Health Department for Weld County, Colorado, and Director of Communicable Disease Control at Santa Barbara County Health Care Services. He was an epidemiologist with the World Health Organization Smallpox Eradication Program in India. He is board certified by the American Board of Preventive Medicine. (RT III 403-405, 24-25, 1-25 : Exh. 10.)

Dr. Juels served on the Santa Barbara AIDS Task Force and has followed the epidemic of AIDS since its inception. He was responsible for publishing information regarding AIDS for Santa Barbara County. He answered numerous inquiries about AIDS

in his capacity of Director of Communicable Disease Control in Santa Barbara. He ran the Venereal Disease Control Program in Santa Barbara County. He screened many gay men for infection of the HTLV-III virus and referred them to other doctors. (RT III 408-409, 19-25, 1-19.)

Like Dr. Fannin, Dr. Juels stated AIDS was very similar to hepatitis-B, except that hepatitis-B was more infectious, and persons with hepatitis-B are allowed to continue their employment. It follows that persons with AIDS who are less infectious should be allowed to continue their employment. He found that the CDC, as early as 1982, was making comparisons between AIDS and Hepatitis-B. Thus, AIDS is not spread by casual contact. (RT III 41, 416-419, 1-25, 8-22, 19-25, 1-2 : Exh. 11.)

Dr. Juels stressed the importance of health care studies regarding the transmission of AIDS. Since there are no documented case of health care workers who care for with person with AIDS, then casual contact of the virus does not represent the mode of transmission. (RT III 420, 426, 15-25, 6-18 : Exh. 12; Exh. 13; Exhs. XIII-XIV.)

According to Dr. Juels, AIDS is not spread by casual contact. His opinion is based on his background, experience and relevant literature. (Exhs. 14-15; Exhs. 17-18 : RT III 440-441, 444, 4-25, 1, 8-23.)

6. Peter R. Wolfe,M.D.

Dr. Wolfe is an Assistant Professor of Medicine at University of California School of Medicine. He specializes in Internal Medicine and Infectious Disease. He is board certified by the American Board of Internal Medicine and the American Board of Infectious Disease (Exh. 23 : Stip. RT. VIII 1327, 3-12; RT VIII 1327-1330, 17-25, 1-25, 1-20). He has served as a consultant for the Respondent since May, 1985.

Dr. Wolfe has extensive background in AIDS. He teaches classes on AIDS. He does medical research on AIDS and he has treated 600 persons with AIDS or AIDS related conditions. (RT VIII 1330, 1332-1333, 1345, 13-18.) He is associated with the AIDS Project Los Angeles. He works with Dr. Gotlieb who diagnosed the first cases of AIDS in the United States. University of California Los Angeles is at the forefront in AIDS research (RT VIII 1385-1386, 16-25)

Based on Dr. Wolfe's research, the body of knowledge regarding AIDS and his experience, he stated AIDS is not transmitted by casual contact (RT VIII 1337, 6-19). Dr. Wolfe does not recommend to his patients to stop working if they can physically continue working. Co-workers of persons with AIDS do not face infection from the virus merely because they work along side someone who has AIDS (RT VIII 1338-1341, 24-25, 1-18.

He agreed with other experts that AIDS is similar to hepatitis-B, but hepatitis-B is more infectious than AIDS (RT VIII 1342-1343, 17-25, 1).

Dr. Wolfe was given the following hypothetical, based on what his knowledge of AIDS was in 1984:

> "Assume that a young man was working at a large defense since 1980. In 1983 he is diagnosed as having AIDS. He

> is a quality control analyst in a firm since 1980. In 1983, he is diagnosed as having AIDS. He is a quality control analyst and has little or no contact with the public. He has only casual contact with his co- workers.
>
> Do these co-workers run a risk of catching AIDS? (RT VIII 1384, 4-11.)

Dr. Wolfe's answer was not based on his experience, research, education and reading ofthe medical literature (RT III 1348-1349, 11, 25, 1-16).

Dr. Wolfe testified there is no risk of the transmission of AIDS via tears and saliva of a person having AIDS (RT VIII 1350, 4-18). Dr. Wolfe stated he and others in the medical community are against quarantine of persons with AIDS:

> A. Our medical advisory committee has talked about the issues of isolation and quarantine, and we do not feel that quarantines are indicated or effective in this disease.
> Q. And why do you say that?
> A. Historically, quarantines have only been effective when a disease has a very short incubation period and is highly contagious. This disese meets neither of those criteria. It takes a rather complex series of acts to get AIDS, volitional acts, compared with the

> the classic communicable disease where, if a gentleman is coughing on the bus and he has tuberculosis, you can't just tell the germs, "Stop there and don't infect me." The Aids Project Los Angeles (APLA) tries to get the message out that people have control over whether they can get the disease or not. They don't need to feel so helpless.
> Q. In terms of volitional acts, what are you referring to?
> A. Mostly, sexual acts.
> (RT VIII 1379, 4-23).

Finally Dr. Wolfe pointed out that Charbourne's condition represented no risk to prevent co-workers at Raytheon. (RT VIII 1388-1390, 3-25, 1-25, 1-22).

The record clearly demonstrates that AIDS is not transmitted by casual contact. Chadbourne represented no risk of infection to other workers at Raytheon.

IV

RAYTHEON DID NOT ACCOMMODATE CHADBOURNE.

The Act and the Commission's regulations require employers reasonably to accomodate the individuals who are

physically handicapped within the meaning of the Act, so long as the accommodation does not impose undue hardship on the employer. (Gov. Code, § 12994; Cal. Admin. Code, tit. 2, § 7293.9.) Assuming Raytheon has proven Chadbourne's condition represents a "significantly greater" risk, then Respondent should not have failed to reinstate Chadbourne, but accommodated his physical handicap.

If AIDS is truly transmitted via casual contact, Raytheon could have accommodated their concerns. Raytheon failed to do so. In fact, Raytheon never ever considered accommodating Chadbourne during the relevant time period.

All witnesses who testified who had participated in the decision as to whether or not Chadbourne could return to work unanimously stated Raytheon never considerd any type of accommodation of the Complainant's physical handicap.

Dr. Hosea and Dr. Juels testified Raytheon never spoke to them about accommodating Chadbourne. (RT I 139, 2-5; RT III 458, 3-7.) Dr. Donald and Nurse Heybl stated they did not recall any management person at Raytheon discuss reinstating the Complainant and accommodating him in some manner. (RT V 815-816, 958, 24-25, ii-11, 11-15.) Umanzio and Dr. Alphas admitted Raytheon never considered an accommodation of Chadbourne's physical handicap. (RT VI 1160-1161, 1-25, 1-16; RT VII 1256-1257, 5-25, 1-14.) Finally, Chadbourne stated the company made no effort to accommodate him (Exh. 2). Raytheon could have easily accommodated Chadbourne. A view of the workplace confirmed the availability of accommodation of the Complainant's

condition. The offices are divided into cubicles where 2 or 3 workers share space set from other clusters of offices by high movable walls. Raytheon could have partitioned the offices where the Complainant worked in such a way so as to not have him in close proximity with the 2 or 3 other co-workers who shared his office space.

The company could have allowed Chadbourne a private office with a door, such offices were unavailable. The plant has many isolated sections where 1 to 6 workers are working on classified parts. Some of these sections have combination locks to keep other employees out or signs which alert employees not to enter these sections or rooms. Chadbourne could have been placed to work in these sections.

If any company has isolated worksites it's Raytheon. Given the classified natue of the work, the company could have accommodated their concerns regarding the transmission of AIDS by having Chadbourne work in one of these isolated sections.

The company could have allowed Chadbourne to work at home on a computer terminal or transfer him to the night work shift. (Exh. 2 pp. 44-45.)

The company could have met with Chadbourne and medical expert and reached an agreement regarding his work activities. Chadbourne could have taken conservative, albeit unnecessary steps to allevaite fears such as using disposable cups as opposed to regular cups when drinking coffee at the common coffee maker, disinfecting the toilet and urinal, taking lunch outside the plant itself and using gloves when touching terminals and micro chips to

protect his hands from cuts when handling the machine parts he examined.

Raytheon envisions the worst possible scenario if Chadbourne would have returned to his position. Raytheon imagines Chadbourne would cut himself or have an attack requiring first aid assistance from another employee. This other employee, according to Raytheon's dark vision, would happen to have an open wound and Chadbourne's blood would happen to enter the blood stream attacking the employee's white blood cells, thereby infecting him with the HTLV-III virus. Raytheon then assumes this victim would then develop AIDS. This incredible set of possibilities is so remote. The trier of fact should not accept as probable Raytheon's speculation and unsubstantiated risk Chadbourne allegedly posed to other workers.

Had Raytheon listened to the advice of its own doctor, Santa Barbara County Health Department, the CDC and Chadbourne's doctor, all parties could have worked out a compromise allowing Chadbourne to return to work. Instead, Raytheon chose the most onerous alternative and did not reinstate Chadbourne. The company failed to accommodate the Complainant. Respondent failed to demonstrate an "undue hardship" if it would have accommodated him.

V

COMPLAINANT IS ENTITLED TO BACKPAY, COMPENSATORY DAMAGES AND OTHER RELIEF

Upon a finding that illegal discrimination has occurred,

the Commission is required to order remedies sufficient to restore the victim to the position he would have been in, but for Respondent's unlawful conduct. (Gov. Code, § 12970, subd. (a).) Such remedies may include, but are not limited to, the award of back pay, lost benefits, and compensatory damages. Moreover, the chosen remedies must also serve to effectuate the purposes and policies of the Act. (DFEH v. Bee Hive Answering Service (1984) FEHC Dec. No. 84-16 [1984-85 CEB], at p. 24; DFEH v. Louis Cairo, FEHC Dec. No. 84-04, at p. 16; DFEH v. Ambylou Enterprises (1984) FEHC Dec. No. 82-06, [1982-83 CEB 3], at p. 8.)

1. Back Pay

The parties stipulated to the amount of Chadbourne's lost wages. (Stip. RT I 23-24, 24-25, 1-9.) In addition, Respondent should repay payments made to Chadbourne while he was on disability from January, 1984, until his death on January 6, 1985. These payments were made to the Complainant from Social Security (SSI) and Metropolitan Life Insurance. SSI paid Chadbourne $547.00 per month from July, 1984, until January, 1986. Metropolitan Life Insurance paid Chadbourne $1,200.00 a month from January, 1984 until July, 1984. In July, 1984, Metropolitan Life Insurance deducted Chadbourne's SSI monthly payments. Metropolitan Life Insurance then began paying Chadbourne $653.00 a month until January, 1986.

///

2. Compensatory Damages for Emotional Distress

In order to make a victim of unlawful discrimination whole for the emotional injury he has suffered because of an employer's wrongful conduct, the Commission has authority to award compensatory damages. (DFEH v. Bee Hive Answering Service, supra, FEHC Dec. No. 84-16, at p. 25; DFEH v. Jack's Restaurant (1984) FEHC Dec. No. 84-08 [1984-85 CEB 5], at p. 12; DFEH v. Donald Schriver, Inc. (1984) FEHC. Dec. No. 84-07 [1984-85 CEB 4], at p. 17; DFEH v. Shakey's Pizza Parlor (1984) FEHC Dec. No. 84-23 [1984-85 CEB], at pp. 33-36; DFEH v. Ambylou Enterprises, supra, FEHC Dec. No. 82-06, at pp. 9-12; cf. Hess v. FEHC (1982) 138 Cal. App. 3d 232, 237.)[32]/

The Department prays that Chadbourne's estate be awarded $50,000.00 for the pain and suffering he endured due to Respondent's failure to reinstate him in January, 1984. The Department also prays that $25,000.00 be donated to the University of California, Medical School in Chadbourne's name for AIDS research. Thus, Chadbourne's Estate should be awarded $75,000.00.

The record clearly established that Raytheon's failure to reinstte Chadbourne had a devastating effect on Chadbourne.

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[32]/ Although Section 573 of the California Probate Code states a decedent can not recover damages for pain and suffering, a decedent can recover compensatory damages in a civil rights case. (Guyton v. Phillips (1981) 532 F.Supp. 1154.)

He was already dealing with the emotional crisis of having a fatal condition. Raytheon's discriminatory actions made worse, an already tragic situation.

Chadbourne testified that when he first learned Raytheon would not allow him to return to work, he panicked. (Exh. 2 pp. 37-38.) He had feelings of rejection, that his life was somehow being taken away from him. Chadbourne stated he was a workaholic and his life revolved around work. (Exh. 2 p. 38.)

His lowest point was when Umanzio told him he could not return to work until there was a cure for AIDS. He lost sleep and worried about his lost income. (Exh. 2 p. 38.) He took tranquilizers and thought of suicide. (Exh. 2 pp. 38-40.) Chadbourne began to feel inadequate and unable to control his life because he couldn't return to work. He sought professional help. He often cried after speaking with Umanzio. (Exh. 2 pp. 41-44.)

Dr. Hosea corroborated the stress Chadbourne underwent as a result of Raytheon's discriminatory action. He stated Chadbourne was often depressed and frustrated because the company did not allow him to return to work. (RT I 141-142, 10-25, 1.)

Elizabeth Wood, a volunteer at the AIDS Counseling Assistant Program in Santa Barbara, also attested to Chadbourne's depression due to Raytheon's action. She stated Chadbourne was very upset and talked about commiting suicide because Raytheon did not let him return to his former job. (RT VII 1222-1224, 17-25, 1-25, 1-13.)

Considering all the evidence, the circumstances, the shoddy manner in which Raytheon treated Chadbourne and the

particularly traumatic effect Raytheon's decision had a Chadbourne, $50,000.00 is warranted to make him whole as possible for the emotional injury he suffered, plus 10% interest.

3. Posting Order

A posting order is warranted here to effectuate the purposes of the Act, the Commission should order Respondent to post the attached Notice at all offices in California in places readily visible to all employees for 90 days from the effective date of this decision. (DFEH v. Jack's Restaurant, supra, FEHC Dec. No. 84-08 [CEB 1984-85 CEB 5] at p. 15, writ granted on other grounds, app. pending; DFEH v. Fresno Hilton Hotel (1984) FEHC Dec. No. 84-03 [1984-85 CEB 2, p. 41, writ granted on other grounds. See Attachment A.

4. Other Relief

Raytheon should conduct training seminar for all employees about AIDS and AIDS-related condition. The Commission should also order that Raytheon develop and disseminate a policy regarding AIDS and AIDS-related condition for the workplace.

VI

PUBLIC POLICY AND AIDS DISCRIMINATION IN EMPLOYMENT

The Department prays the Commission consider the ramifications of their decision in the instant case. If the Commission does not find that AIDS is a physical handicap within

the meaning of the Act, employers will be able to terminate employees who are afflicted with AIDS and/or AIDS-related conditions with impunity. Workers with AIDS will not tell their employers they have AIDS. They may not even go to the doctor to be diagnosed for fear of losing their jobs lest someone informs their employer. At a critical time in AIDS research every case of AIDS and AIDS-related condition must be diagnosed, studied and treated so that a vaccine can be developed. Fear of discrimination due to lack of legal protection will only add to the many problems and tragedies associated with AIDS. Fear, ignorance and hysteria from the public and to some extent from the media, should not be the standard by which this case is judged.

The discrimination of persons with AIDS and AIDS-related conditions is so widespread that major cities have passed ordinances to alleviate the dilemma because there is perception the government on the federal and state level has not act quickly to stop the tragic consequences of discrimination of this new minority group.

It must be remembered that Raytheon is not a ma and pa business. It is a huge company with offices throughout the world. They had at their disposal, had they chosen to utilize such resources, the most up-to-date information on AIDS and most qualified experts. Raytheon discriminated against Chadbourne because of his physical handicap. The company chose to ignore the relevant information and instead, decided upon the most onerous alternative.

///

CONCLUSION

The Department prays the Commission will find the Raytheon has discriminated against Chadbourne due to his physical handicap and award him the relief the Department has sought.

DATED: April 4, 1986.

Respectfully submitted,

DEPARTMENT OF FAIR EMPLOYMENT

AND HOUSING

JOHN R. CASTELLO
Chief Counsel

BRIAN HEMBACHER
Directing Attorney

By: _____
GLORIA BARRIOS
Staff Attorney

Attorneys for the Department

URT PAPER
TE OF CALIFORNIA
113 (REV. 8-72)

ATTACHMENT A

NOTICE TO ALL EMPLOYEES OF RAYTHEON COMPANY

Posted by order of the Fair Employment and Housing Commission, an agency of the State of California.

After a full hearing, the California Fair Employment and Housing Commission has found the Raytheon Company is liable for discrimination on the basis of physical handicap of John Chadbourne, Quality Control Analyst, by several of its managerial employees, under the State Fair Employment and Housing Act.

As a result of this violation of the law, Raytheon Company has been ordered to post this NOTICE and to:

1. Cease and desist from discriminating against any employee who has AIDS or any AIDS-related condition or any employee on the basis of their physical handicap; and

2. Pay to Complainant John Chadbourne's Estate $50,000 in compensatory damages for emotional injury he suffered from Raytheon Company's unlawful discrimination and full backpay due him.

3. Contribute to the University of California, School of Medicine in Los Angeles, $25,000 in Chadbourne's name for AIDS research.

DATED: _____ BY: _____
FRANK UMANZIO
DIVISION OF INDUSTRIAL
RELATIONS MANAGER
RAYTHEON COMPANY

THIS IS AN OFFICIAL NOTICE. IT SHALL REMAIN POSTED FOR NINETY DAYS ON EMPLOYEE BULLETIN BOARDS AND AT ALL LOCATIONS WHERE APPLICANTS OBTAIN AND FILE JOB APPLICATIONS. FURTHER, THIS NOTICE SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY MANNER WHICH WILL HINDER ITS VISIBILITY.

URT PAPER
TE OF CALIFORNIA
113 (REV. 8-72)

DECLARATION OF SERVICE BY MAIL

I, the undersigned, hereby declare:

I am over eighteen years of age and not a party to the within cause. My business address is 322 West First Street, Room 2126, Los Angeles, California 90012.

On April 4, 1986, I served a copy of the attached

DEPARTMENT'S POST-HEARING BRIEF

on each of the following, by placing the same in an envelope (or envelopes) addressed (respectively) as follows:

Steven C. Owyang
Executive and Legal Affairs Secretary
Fair Employment and Housing Commission
1390 Market Street, Room 410
San Francisco, California 94102

Alfred Phillips
Raytheon Company
141 Spring Street
Lexington, Mass. 02173

Leonard Graff
Natinal Gay Rights Advocates
Public Interest Law Firm
540 Castro Street
San Francisco, California 94114

Richard J. Lopez
Administrative Law Judge
Office of Administrative Hearings
314 West First Street
Los Angeles, California 90012

Each said envelope was then on said date sealed and deposited in the United States mail at Los Angeles, California, the county in which I am employed, with the CERTIFIED postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 4, 1986, at Los Angeles, California.

Celia Acero
CELIA ACERO

URT PAPER
TE OF CALIFORNIA
113 (REV. 8-72)

NYLJ 10/17/83 p. 1 (1)

...ttle tickets and exercised its option ...y Russell's house. It paid an ad... ...nal $90,900 to Russell before the ...tle drawing. Russell, at the time of the sale, was under age fifty-five and did not buy another principal residence within two years.

The IRS looks gift house in the mouth and raises

...Russell's capital gain. He has a ... ...capital gain on the sale of his house to charity. Note: IRS makes a point that Russell was under fifty-five and did not buy another principal residence within two years. More about this later.

...Russell has not made a deductil...

Continued on page 8, column 1

Tomorrow's Columns

The columns in this space tomorrow will be "Antitrust and Trade Practice" by Stephen M. Axinn and Neal R. Stoll, and "Poverty Law" by Martin A. Schwartz.

Doctor Treating AIDS Gets Writ Against Eviction

A State Supreme Court justice issued a preliminary injunction Friday barring a Greenwich Village cooperative from attempting to evict a doctor treating AIDS patients.

Also denying the board's motion to dismiss, Justice Ira Gammerman directed that the physician, Dr. Joseph A. Sonnabend, be permitted to continue his tenancy in the building at 49 West Twelfth Street until the court decides the lawsuit on the merits. A temporary restraining order was issued Oct. 7.

The board of the cooperative is ac-

Continued on page 4, column 4

...Federal securities laws in their fi... ...lings with the ...curities and Ex... ...change Comi...

Law in Issue

The state takeover disclosure act requires the filing of a registration statement when a takeover bid is made. The term is defined to mean the "acquisition of or offer to acquire, pursuant to a tender offer . . . any equity security of a target company."

Condec's contention, as in

Continued on page 8, column 1

Liman, Morgenthau Among 6 Named To Sentence Panel

Special to the Law Journal

ALBANY — Governor Cuomo announced over the weekend his six appointees to the Sentencing Guidelines Committee which was established to recommend mandatory sentencing guidelines to the Governor and Legislature.

Joseph W. Bellacosa, who is resigning next month as Clerk of the State Court of Appeals, will be chairman of the fourteen-member committee. Mr. Bellacosa, a graduate of St. John's University Law School and a former professor and assistant dean there, will become professor of law and director of the Governmental Law Center at Albany Law School.

The Governor also named:

• Arthur L. Liman, a partner in the New York City firm of Paul, Weiss, Rifkind, Wharton & Garrison. Mr. Liman is former chairman of the Executive Advisory Committee on the Administration of Justice and is president-elect of the Legal Aid Society of New York.

• Austin Gerald Lopez, a

Continued on page 8, column 4

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...Of Federal...

The "rating" of federal ... "certain popular legal mag... was deplored by forty four N... City lawyers, many of them ... in major firms, in a ste... released for publication toda...

The statement was distri... Lane Silverman, a senior pa... Fried, Frank, Harris Shr... Jacobson, who said it was tri... by an article in a recent ed... a monthly publication, The ... Lawyer.

Among Supporters

Among the forty-four subsc... to the statement were presen... former presidents of the New ... State Bar Association, The As... tion of the Bar of the City o... York and the New York C... Lawyers' Association; three fo... presidents of the American Co... Trial Lawyers, the present ... former U.S. Attorney for ... Southern District of New York ... four former Federal judges in ... York who are now in private ... tice.

In the two-paragraph state... the lawyers stated they "partic... deplore the undeserved invi... directed by the magazine at J... Mary Johnson Lowe, of the Sou...

Judge Upho... In Environm...

A State Supreme Court just... satisfied that a proposed expans... of the subway storage yard ... Jamaica will not have any "sign... cant effect on the environment," h... rejected an effort by Queens re... dents and officials to force the Tra... sit Authority to submit an e... vironmental impact statement.

Justice Frank Vaccaro, in dism... ing an Article 78 petition, ruled th... the Authority's submission of ... "negative declaration" on any po... ble adverse environmental effe... was sufficient ... of the State Environmental ... Review Act.

The decision is published on pag... 14, column 1.

Justice Vaccaro pointed out in hi... decision in *Matter of Mose... (Simpson)*, filed last week in King... County, Special Term, Part 1, that ... because of a "glaring omission" in ... the statute, the agency had the sole ... authority to determine whether an ... environmental impact statement had ... to be filed with the Department of ... Environmental Conservation. The ... statement, known as an EIS, would ... have to affirm there would be no ... adverse effect on the environment.

However, "strange indeed" though ... it is, the court emphasized, the law ... exempts agencies such as the Transit ... Authority from the requirement of ... filing such statements before em...

...n daily professional dividends with a New York Law Journal subscription. Coupon, Page 4.

...ment Ruling

...ned in South
...t in New York

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...enting opinion stated that "too short a period of time" passed since ...e misconduct and there was no ...roof submitted that the petitioner's ...mbling problem was overcome.

State Trooper's Case

In *Matter of De Jesus*, No. 48828, a ...ate Trooper was involved in an ...tomobile accident fifteen minutes ...er completing a tour of duty. He ...ed for Workers' Compensation ...nefits, contending that the injury ...curred within the course of em...yment. The Board agreed, and ... employer appealed.

The Third Department, in a ...ned opinion by Justice A. Franklin ...honey rejected the Board's deter...nation, holding that where the of...r completed his tour of duty, ...nged into civilian dress and drove ...is own automobile, the accident ... outside the scope of his employ...t.

"To hold that the accident was ...ctly related to employment ...use the trooper was subject to ...ty-four-hour recall," the court ...ained, "would require a state...that State Police are entitled to ...matic statutory protection ...ever and however injured." ...refusing to make such a conclu...the court decided there was no ... between the accident and the ...yment to invoke the benefits of ...orkers' Compensation Law.

...Third Department, in another ... decision involving Worker's ...nsation, upheld the Board's ...ination that the claimant's ...d died "in the course of ...ment" at a facility for the ...ly ill when he was stabbed by ...r mental patient three years ...e patient threatened "to get ...e court, in *Matter of Masek*,

Jury Awards $50(),(HH) For Injury on City Bus

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Racine, from p. 1

"This is stubborn opposition" by the school district, Kimble said. "Their policy is grounded in pure fear and uninformed opinion. When you have that kind of fear, you have these kinds of rules."

Under Racine's policy, staff or students with AIDS or AIDS-related complex (ARC) "are excluded from regular school attendance or attendance at work."

In a suit filed Feb. 10, the teachers' union said the policy violates the state's ban on discrimination based on handicap and sexual orientation and fails to consider whether AIDS is communicable in a work setting (*APL*, March 12, p. 5).

The school district, on the other hand, said the policy was necessary to protect the health and safety of students and staff.

The state investigator said that while the district's goals were "understandable," medical knowledge indicates AIDS "is not spread by casual contact." Further, she said, given that 73 percent of those with AIDS are sexually active homosexual and bisexual men, the policy "has a disparate impact on that group of people because of their sexual orientation."

The state issued a policy statement in February determining AIDS and ARC "a legally protected handicap under the Wisconsin Fair Employment Law," the investigator noted. (*Racine Education Association v. Racine United School District*, ERD Case 50279, Wis. DILHR) □

Discrimination, from p. 1

Freeman told *APL* that despite what looks like expedited action at Region IX, he still expects AIDS-related complaints to languish in Washington, DC. "It's not an issue of taking complaints, it's what happens to them," he said. "My understanding is that there are current complaints that the regional office took in March, docketed and sent to headquarters, that are still waiting for action."

Patricia Mackey, special assistant to federal Office for Civil Rights Director Betty Lou Dotson, told *APL* that the Region IX effort did not stem from a national directive and does not represent a change. "There never has been any bar to accepting [AIDS-related] complaints."

HHS has asked the Justice Department for an opinion on how AIDS should be treated under federal handicap law. The oldest pending charge of discrimination will not be decided until the opinion is issued, Mackey said. The charge was filed in 1983 against a hospital in Charlotte, NC, by a nurse who died this year. □

Insurance

MAINE LAW BARS INQUIRIES ON TESTS

Insurers will be barred from asking applicants to reveal whether they have been tested for exposure to the HTLV-III virus, under a Maine law that becomes effective July 16.

The law (LD 2367, Chapter 711), signed by the governor April 16, also prohibits insurers from requiring applicants to reveal test results before approving an application. It does not bar insurers from requiring a new test of an applicant, however.

The ban on questions concerning prior testing expires Oct. 1, 1987.

"It doesn't say insurers can't ask a person to take a new test. That was a compromise," said Rep. Charlene Rydell, a sponsor of the measure. "It's somewhat of an opening, but not a clear opening."

"I'm happy we were able to get that strong a piece of legislation, but I still have some questions about how it will be interpreted and used," Rydell told *APL*. "We may need some further legislation."

Russel Iuculano, governmental affairs director for the American Council of Life Insurance, said his group is "not happy" with the law. "Our understanding is that you can't ask an applicant for prior test history — even those that measure the existence of the virus."

"We don't want the results of tests given by alternative testing sites or blood banks," he said, "but we would like information from an individual's treating physician."

Dale McCormick, president of the Maine Lesbian/Gay Political Alliance, also criticized the new law. The alliance "wanted a public policy stand that using this test as a condition for insurability was wrong," she said. "There was simply, absolutely, no support for a public policy view. The legislators were only concerned with the right of business to do business," she told *APL*.

When the legislation was reported out, the state insurance bureau was directed to keep statistics on how many people are asked to take a test and how many are rejected for coverage, McCormick said. "We at least got the promise of statistics to deal with it when it becomes a problem. And it will."

DC Council Approves Bill

Meanwhile, a bill that would bar insurers from using any tests to detect the probable causative agent of AIDS was unanimously approved on first reading May 13 by the District of Columbia City Council (*APL*, May 7, p. 3).

A final vote will be taken May 27.

Quarantine

LACK OF ACCORD KILLS COLORADO BILL

DENVER — Legislation that would have permitted state health officials to quarantine persons with AIDS was killed by its sponsor May 16.

In its final version, the bill (HB 1290), offered by Rep. Dale Erikson (R), would have permitted health department officials to test for AIDS in certain cases and would have required clinics and physicians to report cases of AIDS or the infection which causes AIDS (*APL*, May 7, p. 1).

The House refused to accept amendments made to the bill when it was given final approval in the Senate on May 15. Unable to reach a compromise, the House and Senate both voted May 16 to adhere to their positions. Erikson then pulled the bill from consideration.

A spokesman for the Colorado Department of Health, which supported the measure, said he was "disappointed" at its defeat. "We felt the confidentiality and due process provisions were better [than the current statute]," said Fred Wolf, director of the sexually transmitted disease program.

Julian Rush, executive director of the Colorado AIDS Project, told *APL*, "We were very fortunate" that the bill was killed, although its demise was "just a quirk. I don't have any reason to assume someone wouldn't want to introduce another bill next session." □

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Discrimination

OPINION EXPECTED SOON FROM JUSTICE DEPARTMENT

A legal opinion on how AIDS should be treated under federal law banning handicap discrimination is expected to be released soon by the Justice Department.

The Department of Health and Human Services had asked Justice for an opinion on how to handle cases of AIDS-based discrimination under Sec. 504 of the 1973 Vocational Rehabilitation Act, which bans handicap bias by recipients of federal funds (*APL*, May 21, p. 2). Justice is responsible for coordinating each federal agency's grants program to ensure compliance with Sec. 504.

Word of the contents of Justice's opinion was provided to the *New York Times*, which reported on June 8 that the department was prepared to hold that persons with AIDS should be covered under the law. According to the report, persons who test positive for HTLV-III antibodies also would be covered under the law, which bans discrimination against individuals perceived to have a disability.

Justice Department officials refused to confirm details of the report and told *APL* no opinion would be released until late this week, at the earliest.

Several cases have been filed with HHS' Office for Civil Rights which is responsible for enforcing Sec. 504 as it pertains to recipients of departmental funds. A spokesman for the office told *APL* no final action will be taken on any of the complaints until Justice's opinion is received. □

Discrimination

AIDS TERMED HANDICAP UNDER MISSOURI LAW

AIDS is a handicap under Missouri law, the state Commission on Human Rights said June 3.

Responding to an inquiry by the National Gay Rights Advocates, Alvin A. Plumer, executive director of the commission, said that AIDS complaints are accepted under any of the three state antidiscrimination laws that cover handicap in housing, public accommodations, and employment.

A new state civil rights law (SB 513), passed by both houses and awaiting the governor's signature, will consolidate provisions of the three antidiscrimination laws into one measure, Plumer said.

The only AIDS complaint filed to date involved employment, Plumer told *APL*. In that case, he said, the commission issued a confidential ruling which found probable cause to believe discrimination had occurred. The ruling came in July 1984, but the complainant died during conciliation proceedings.

The complainant, a health care worker, left no will, which raised the issue of whether an estate can receive monetary damages, according to Plumer. The case was closed with no further action, he added.

The commission's probable cause ruling was issued nearly one and one-half years before the first published decision in which AIDS-based employment discrimination was found to violate state law (*Shuttleworth v. Broward County, Fla.*, Fla. Comm. on Hum. Rel., FCHR No. 85-0624). However, under Missouri law information on charges that have not gone to court is not released unless one of the parties makes it public, Plumer said.

Any future complaints would be handled on the assumption that AIDS is a handicap, Plumer said, although as for other complaints, the determination of whether discrimination occurred would depend on the facts of the case. □

Testing

PROGRAM TO NOTIFY TRANSFUSION RECIPIENTS ANNOUNCED

Physicians will notify some 2,500 persons within the next few months that they received blood from donors who later were found to be positive for HTLV-III antibodies, the American Red Cross announced June 6.

The contaminated blood came from persons who gave blood before March 1985, when the test to screen for HTLV-III antibodies was developed. The donors' seropositivity status was discovered when they attempted to donate blood again after the test was developed. Since mid-1985, donors whose blood tests positive have been notified of their status.

Under the new "Look-Back" program, the Red Cross, which collects half the nation's blood supply, will notify the recipients' physicians, who then will notify their patients.

"The American Red Cross obviously regrets any emotional stress this notification process may generate," the organization said. "We have voluntarily undertaken this initiative not to alarm the public, but in the best Red Cross tradition of responsible service to the nation."

Terry Gautier, a spokesman for the Red Cross, told *APL*, "I really feel we're doing the responsible thing . . . If we can stop the spread of this disease to just one person, this program will have been a success."

The program was endorsed by the American Hospital Association, which represents most U.S. health care institutions.

Edward Burtz, association vice president, said hospitals "welcome the opportunity" to help trace any patients who may have received contaminated blood. Burtz said the association and its member hospitals "will work closely with the national blood organizations and with physicians to ensure that patient confidentiality is maintained." □

AIDS Policy & Law
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THE BOSTON PHOENIX - JAN. 15, 1985

ILL-FOUNDED NOTIONS

Job discrimination against cancer patients

by Peter Canellos

The diagnosis has been confirmed, and it's the one you dreaded most. You have cancer. But there is hope, the doctor says. Surgery, followed by several monthly chemotherapy treatments, should beat back the malignancy. After that, it is likely you won't ever hear from the cancer again.

That prognosis, offered every year to hundreds of thousands of Americans, is medically sound. Many people with cancer require only an initial procedure, or series of procedures, to force their disease into a remission that is often permanent. Indeed, there are five million cancer patients in the United States today, two million of whom are more than five years past diagnosis. But though their illness may be gone for good, it's not necessarily true that these people aren't likely to suffer as a result of their cancer again. According to an American Cancer Society (ACS) study, a majority of cancer patients report that one of the most horrifying effects of their disease comes after their treatments, when they go back to work or set out to look for a job. Ironically, discrimination continues despite the increasing likelihood of surviving cancer. A recent National Cancer Institute study says that "better than 50 percent of all patients diagnosed with cancer are potentially curable."

But employers are reluctant to hire cancer patients for many reasons, some of which are simple misunderstandings. Commonly accepted myths, such as that cancer is contagious and that all cancer patients will die of their disease, are at the root of much of the prejudice against people with a cancer history. But employers also fear putting a cancer patient on the payroll for a more calculated, dollars-and-cents reason: in the event of a relapse, an employee with cancer could run up huge medical bills, and drive up the company's health-insurance premiums.

A typical case is that of Barbara Service, who last summer was denied a job with the New York Police Department because she was treated for Hodgkin's disease (a cancer of the lymphatic system) six years ago. She underwent four months of radiation therapy in 1978, and was told by her doctors that she was completely cured. She has not received any treatment since then, and has remained healthy. Service, now 24, became interested in joining the NYPD as

Continued on page 4

ILL-FOUNDED NOTIONS

by Peter Canellos

Continued from page 1

a uniformed police officer a little over a year ago. In December of 1983, she took the written qualifying exam and passed the test with a score of better than 90 percent. Then, last June, she took the department's agility test. She passed that, too. In August, she was required to take a physical examination and present her medical history. The NYPD physician failed her on the basis of her cancer history. If she had passed the medical exam, she would have had to take just one last step — a psychological test — before being trained as a policewoman.

Following department grievance procedures, Service appealed the results of her medical test, this time providing the NYPD with X-rays, hospital records, and statements from her physicians, all showing her to have been completely cured for six years. In October, she received the result of her appeal. The terse, unsigned letter read: "Ineligible because of past history of Hodgkin's disease."

"Even when I had cancer I wasn't sick," Service says. "People say, 'You had cancer,' and I say, 'I know I did but I wasn't sick.' . . . I had radiation treatments one summer and wasn't even sick then." But the cancer continues to haunt her. "What they [the NYPD] did wasn't fair," she says. "They aren't saying I'm ineligible because I have it now, it's because I had it then." Both Service and her mother have tried unsuccessfully to reach the NYPD personnel bureau many times since learning the result of her appeal. Service says she was given the name of a person to contact, but that that person hasn't been in the office whenever she's called and hasn't responded to any of her messages.

Lieutenant Walter Doyle of the NYPD personnel bureau told the *Phoenix* that the department has a policy of not hiring people with a cancer history. "It's unfortunate, but we have to set some kind of rule somewhere and that's it," Doyle says, adding that the NYPD medical requirements have been challenged in court and have been upheld. "Our training is six months at the Police Academy, which is quite expensive," he says. "We don't want to spend so much money on someone we may not be able to use. As you know, with that type of disease, it's never completely cured. It may just be in remission. Suppose it flairs up again in five or six years?" (Cancer specialists maintain that cancer can be, and routinely is, *completely* cured.)

Doyle says that the department is currently in the process of settling a case involving an officer in remission from Hodgkin's disease who has suffered a relapse. The officer was first diagnosed as having cancer after being hired; now she is being "surveyed out" of the department, and will be paid a pension for the rest of her life. Doyle says, "If that [a cancer relapse leading to permanent disability] happens often, it drains our pension fund — which is another reason we have to look at people very closely."

Service is just one of many people in various sectors of the economy to be closed out of jobs because of a cancer history. In separate studies of job discrimination as it relates to cancer patients in white-collar and blue-collar/service-sector jobs, ACS sponsored researcher Frances Feldman, a social-work professor at the University of Southern California, monitored the experiences of 345 cancer patients who returned to work after treatment. The results of Feldman's study were published last year. She found that 43 percent of blue-collar and service-sector jobholders were fired or denied promotions by their former employers, even though doctors stated that they were well enough to work. Feldman found that eight percent of white-collar employees were fired, and that another 19 percent were denied promotions or forced off the company health plan. Even higher percentages of workers in both categories faced attitudinal or behavioral abuse — such as the reluctance of other employees to sit next to the cancer patients.

One source of job discrimination against cancer patients is myths about the nature of cancer. Feldman found that a sizable number of employers and workers fear that cancer is contagious; that myth results in both firings and behavioral abuse, such as forcing the cancer patient to drink out of paper cups instead of non-disposable mugs during coffee breaks. Then there is the so-called death-sentence myth. Many employers believe that the cancer-stricken worker will live only a few months, with frequent absences from the job, and will distract fellow workers into a *Brian's Song*-type deathwatch.

In some cases, Feldman found, employers fired cancer patients for no other reason than that other workers were "disturbed by" or were insensitive to the cancer patient. In Feldman's study, three out of the four blue-collar workers with head-and-neck cancer she observed were fired for just such reasons. All four were fully recovered, but treatment had left their voices hoarse or lost. In three of the cases, co-workers mocked and mimicked the cancer patient. Since all three cancer patients were in some sort of supervisory position, their bosses fired them on the grounds that they had lost their effectiveness with their subordinates. One of the fired patients later attempted suicide.

The fourth blue-collar worker with head-and-neck cancer was able to maintain his effectiveness and keep his job by anticipating the prejudice of his colleagues. Before attempting to bark out orders in a high-pitched voice, he told his workers he was in a "second adolescence" and made a point of joking about his voice along with them. Says Feldman, "His experience shows that people should be prepared for what they might find."

Myths and prejudices account for some of the job discrimination cancer patients face. But more tangible factors, such as pensions and group health-insurance premiums, also create problems for cancer patients who wish to return to work. The majority of today's group health plans have "experience-adjusted" premiums, which means premiums go up, sometimes dramatically, based on how much insurance the group uses. In her study, Feldman found that because of experience-adjusted premiums some employers expressed reluctance to hire cancer survivors, since a costly relapse would send premiums soaring. To combat this form of discrimination, some cancer patients try to conceal their condition, though most can't get away with it because many job-application forms, and all health-insurance forms, include a question on "serious illness."

Blue Cross & Blue Shield, the nonprofit insurance company that covers 60 percent of the Massachusetts population, bases its rates on "experience adjustment." Blue Cross & Blue Shield spokesman Paul DiNatale says denying a job to a cancer patient for fear he will drive up the premiums is "a form of discrimination that is truly abominable," though he defends the insurance industry's practice of basing yearly rates on the amount of illness among company employees in the previous year. "One of our thrusts is health education — teaching people to stay healthy," DiNatale says. "One group might have a good year, so they should share in the savings."

DiNatale says he knows of companies that refuse to hire smokers or obese people for fear of health problems in the future, but speculates that cancer patients are discriminated against most often. He attributes the stigma out of cancer, as opposed to other diseases, to the death-sentence myth. Dr. Paul Nay, chief medical director of Massachusetts Mutual in Springfield, says that his company's actuarial research has shown that there are great differences in survivability among various types of cancer distinction employers don't usually make.

* * *

Educating the public about the survivability of cancer and providing support for patients who are victims of discrimination are two of the central aims of Cancer Hopefuls United for Mutual Support (CHUMS). A national organization of cancer survivors and their relatives and friends, CHUMS sends speakers to various functions around the country to counteract what Sara Splayer, the group's president, calls "the very great bias against cancer patients." Splayer blames "insurance discrimination" for creating a situation in which employers have an economic excuse not to hire a cancer patient, and also notes that employers don't routinely discriminate against job applicants with a history of other diseases.

All of this is a result of the fact, Splayer contends, that society has singled out cancer as a uniquely fatal condition. The mass media frequently portray cancer patients as wan and emaciated, bravely going to their death, she says, and movies and television programs seldom feature characters who are treated for cancer and survive. "*Terms of Endearment* was wonderful until the doctor looks at Debra Winger and says, 'It is cancer,'" Splayer says. "I thought, 'Oh, my God, they're going to kill this character off.' When everyone else in the theater was crying over the death of this fictional character, I was crying for what it would do to so many people with cancer. It's the death-sentence myth all over again."

CHUMS is credited with lobbying New York Congressman Mario Biaggi to propose a bill that would outlaw any form of discrimination against cancer patients. Introduced into Congress last year, the Biaggi bill is scheduled for committee hearings early in the next session. At that time, the House Education and Labor Committee will try to ascertain the bill's impact on the insurance industry and to determine whether denying a life insurance policy to a cancer patient constitutes discrimination. In any case, the bill is not expected to affect the way health-insurance premiums are set.

The Boston office of the

American Cancer Society is taking an active interest in promoting the Biaggi bill. According to ACS Boston spokesman Terry Freundlich, the Boston office has provided Biaggi with eight case histories of discrimination against cancer patients by Boston firms. State Representative Paul Kollios of Worcester is in the process of preparing a bill that would specifically ban discrimination against cancer patients in Massachusetts. Some lawyers believe cancer patients may be protected by the state's anti-discrimination laws for the handicapped, but to date, the laws have not been tested on this point; hence, the necessity of the Kollios bill. Says Kollios aide Mary Clark, "Other states have passed bills like this, and, in researching it, [Kollios] found that Massachusetts didn't have something that explicit." Clark says Kollios will submit the bill this legislative session.

* * *

In Jane Brody's 1977 book *You Can Fight Cancer and Win*, Dr. Robert J. McKenna, a California cancer surgeon active in fighting job discrimination against his patients, estimates that job bias against cancer patients costs the nation's economy $500 million a year. Brody and McKenna claim that many companies refuse to hire a cancer patient until he is five years past diagnosis. "The five-year policy of many companies is absurd," McKenna says. "What is a person supposed to do for those five years — watch television and go hungry? Industry loses a qualified employee, the government loses tax dollars, and another family is forced to go on welfare."

Brody notes that research does not support the belief that cancer patients are able to work only sporadically. In a study of employees for the pre-breakup AT&T System, cancer developed at a rate of 167 cases per 100,000 employees each year. Fifteen percent of the patients died, and four percent were put on permanent disability, but 81 percent of the cancer patients returned to work after treatment, having missed on the average 80 days of work. Says Brody, "Company officials concluded that while disability from cancer can be prolonged, it is far less common a problem compared to other diseases. They added that they especially welcomed the return to work of a valued older employee who has recovered from cancer."

Personnel officers at eight of Boston's largest employers contacted by the *Phoenix*, including John Hancock Insurance, Bank of New England, Massachusetts General Hospital, and Digital Equipment Corporation, asserted that a cancer history has no impact on whether they would hire a person — even as it relates to health benefits. Despite the employers' claims, social workers at Boston-area hospitals report that many patients say they feel they lose or are denied jobs because they have a cancer history. The social workers add that the patients are not prepared to confront their employers or go public with discrimination complaints. "When they do face discrimination, people are afraid to deal with it directly," says Naomi Sterns, director of social work at Boston's Dana-Farber Cancer Institute. "Their self-esteem and confidence is gone. They feel that their body has betrayed them and they just don't have the confidence or energy to go after an employer."

One Boston-area discrimination case in which the victim did step forward is that of North Shore firefighter Jeffrey Hardy. Hardy had been treated briefly for a mild form of Hodgkin's disease when he was a teenager. He later trained for six years to become a firefighter, and earned a high score on the state civil service exam. Still, Hardy was rejected for a firefighter's position in Ipswich in 1976. In explaining the decision, the Ipswich town manger told local newspapers that he feared Hardy's cancer would recur and leave the town responsible for long-term disability payments. Hardy tried to reapply for the job later that year, after getting four doctors to tell the town manager that the cancer was fully arrested. But the original decision stood. Hardy related his dilemma to local newspapers, including the *Boston Globe*. Eventually, Hardy was hired as a firefighter at the General Electric plant in Lynn.

Unlike Hardy, many cancer patients applying for jobs are not required to reveal their medical history, creating a major "to tell or not to tell" dilemma for them. Phyllis R. Stein, director of career services at Radcliffe College, is working with three colleagues on a book designed to help cancer patients solve this type of question. Stein says the book, to be titled *Back to Work: Managing Your Career After Cancer*, will address such issues as whether to tell a prospective employer about a cancer history, how to cover up gaps in a resume, and how to contend with interview questions such as "Where do you see yourself in five years?"

Stein says that, in her experience as a career counselor, she has found that many cancer patients consider career advancement a psychological aid in fighting their disease. For this reason, she does not advise cancer patients who have worked all their lives to abandon their careers when they become ill. She says her book will not try to tell patients whether or not they should tell an employer about their disease — assuming, of course, they have a choice; rather, the book will discuss the pros and cons of disclosing the information. On the pro side, an understanding employer could be supportive, and the worker wouldn't have to cover up any absences necessary for treatment. On the "con" side, Stein says, is "employment discrimination and people's leprosy-like response to cancer patients."

Stein says she feels that if a cancer patient is working at or applying for a job in an organization in which another worker has been open about a cancer history and has been persecuted because of it, the worker or applicant would be justified in hiding his own cancer history. And because some firms are so inflexible about hiring people with a cancer history, Stein says former cancer patients should "get good legal advice" before making their condition known, even if the job application form specifically asks for a medical history.

* * *

One person who failed to inform his employer of a cancer history related his story to Frances Feldman, shortly after she finished her landmark study on cancer discrimination. The ex-patient was an Air Force lieutenant who had had surgery for a brain tumor seven years before joining the service. When he first enlisted, he did not tell the doctor performing his physical of his cancer history, and he passed the physical. A few years later, he was up for a promotion and again had to take a physical. This time, the Air Force doctor noticed the scar on the lieutenant's head and asked him how he got it. The lieutenant told him. The Air Force immediately brought charges against him for the purpose of giving him a medical release. The lieutenant got doctors to testify that he was fully cured; the cancer had been last treated almost 10 years earlier. The hearing board found him medically fit for service. Having lost that battle, his superior officers tried him again — this time for not mentioning his cancer history at the time of his first physical. They succeeded, and he was discharged. The lieutenant wrote to Feldman, "They were so fearful of having someone with cancer that even though they couldn't get me out for a medical reason, they pressed on until they found a way." □

James G. Ledbetter, Ph.D./Commissioner

GEORGIA DEPARTMENT OF HUMAN RESOURCES

Wayne Yancey (404) 656-3377

878 PEACHTREE STREET, N.E. / ATLANTA, GEORGIA 30309

June 19, 1986

Mr. Benjamin Schatz, Esquire
Director
AIDS Civil Rights Project
National Gay Rights Advocates
540 Castro Street
San Francisco, California 94114

Dear Mr. Schatz:

This is with reference to your letter of May 30, 1986 concerning AIDS being considered a physical handicap under Georgia's anti-discrimination laws. Georgia is, of course, subject to federal laws relating to discrimination and the handicapped. It is my understanding that the United States Department of Justice has ruled that AIDS is considered a handicap under various federal anti-discrimination laws.

Georgia Code Section 34-6A-1 prohibits discrimination against the handicapped in employment. This law does, however, exempt persons with a communicable disease from its provisions. The law does not define "communicable disease" and the health code does not classify AIDS as a communicable disease. The law has not been tested and no judicial opinion has been issued relating its provisions to AIDS.

The Department of Human Resources advises employers to continue the employment of AIDS victims since the disease is not transmitted through casual contact.

You may wish to also contact the Office of Fair Employment Practice of the Georgia Department of Labor concerning their rules and regulations.

Although the content of this letter is not intended to be a legal opinion, I hope it will be of value to you.

Sincerely,

James W. Alley

James W. Alley, M.D., M.P.H
Director
Division of Public Health

JWA/dhj

AN EQUAL OPPORTUNITY EMPLOYER

Minnesota Department of Human Rights

MINNESOTA

Ref: June 6

June 3, 1986

Mr. Benjamin Schatz, Esquire
Director, AIDS Civil Rights Project
National Gay Rights Advocates
540 Castro Street
San Francisco, California 94114

Dear Mr. Schatz:

The Minnesota Human Rights Commissioner requested that I reply to your letter dated May 30, 1986, regarding Acquired Immune Deficiency Syndrome (AIDS).

The Minnesota Human Rights Act, Minnesota Statute Chapter 363, prohibits discrimination against disabled persons in employment, housing, public accommodations and public services.

A disabled person is any person who (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

The Minnesota Department of Human Rights does not issue advisory opinions on what constitutes discrimination under state statute. A case-by-case determination would be made on whether a person with AIDS or AIDS-Related Complex would have statutory protection under the Minnesota Human Rights Act.

The Minnesota Department of Human Rights has currently issued a probable cause determination of discrimination in one AIDS case and is currently initiating the processing of a second AIDS complaint.

Thank you for bringing this matter to our attention and we trust that this information will be useful for your purposes.

Very truly yours,

Walter C. Barwick
Deputy Commissioner

WCB/edm

AN EQUAL OPPORTUNITY EMPLOYER

500 Bremer Tower, 7th Place and Minnesota Street, St. Paul, Minnesota 55101 (612)296-5663 or (800)652-9747

RHODE ISLAND

Rec'd June 27, 1986

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

COMMISSION FOR HUMAN RIGHTS
10 Abbott Park Place
Providence, R.I. 02903-3768
(401) 277-2661

June 25, 1986

Benjamin Schatz, Esq.
Director/AIDS Civil Rights Project
National Gay Rights Advocates
540 Castro Street
San Francisco, California 94114

Dear Mr. Schatz:

In response to your request for information concerning the Rhode Island Civil Rights Laws vis-a-vis AIDS, please note that on December 6, 1985, the Commissioners voted to communicate through its counsel to the Rhode Island Governor's Committee on the Handicapped that they consider AIDS a handicap within the provisions of Rhode Island General Law 28-5-7 (Fair Employment Practices Act).

Although it was not posed at the time, it would be a reasonable inference that the same interpretation would apply to Rhode Island General Laws 11-24-2 (Public Accommodations), 34-37-4 (Housing), and 34-37-4.1 (Credit).

The Commission has not yet received any complaints from persons with AIDS, nor from anyone who is perceived to have AIDS (perception of handicap being protected under our laws). We can only say, therefore, that the Commission would process an otherwise jurisdictionally-appropriate complaint from a person without being able to give you any decisional information.

You may wish to inquire further on the subject by contacting the following offices:

Rhode Island Governor's Commission on the Handicapped
275 Westminster Mall
Providence, Rhode Island 02903

Rhode Island Project/AIDS
c/o RI Department of Education
22 Hayes Street
Providence, Rhode Island 02908

We hope that this answers your questions.

Very truly yours,

RHODE ISLAND COMMISSION

Eugene L. Booth
Executive Director

ELB:jlg

1/

Read 7-7-86

STATE OF ALASKA

HUMAN RIGHTS COMMISSION

BILL SHEFFIELD, GOVERNOR

AGENCY HEADQUARTERS
800 A STREET, SUITE 202
ANCHORAGE, ALASKA 99501-3628
PHONE: (907) 276-7474

NORTHERN REGION
675 SEVENTH AVENUE, STA H
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1561

SOUTHCENTRAL REGION
800 A STREET, SUITE 204
ANCHORAGE, ALASKA 99501-3628
PHONE: (907) 274-4692

SOUTHEASTERN REGION
PO BOX AH
314 GOLDSTEIN BUILDING
JUNEAU, ALASKA 99811
PHONE: (907) 465-3560

June 30, 1986

Benjamin Schatz
Director, AIDS Civil Rights Project
National Gay Rights Advocates
540 Castro Street
San Francisco, CA 94114

Dear Mr. Schatz:

I have received your letter of May 30, 1986 discussing Acquired Immune Deficiency syndrome (AIDS) as a medical disability and your request for information from our agency that AIDS qualifies as a handicap under Alaska law.

The Alaska Commission has not ruled on this question. Our staff, however, have been instructed to accept complaints of discrimination in employment because of AIDS on the basis of physical handicap.

AS 18.80.300 defines physical handicap as "the existence or history of an anatomical, physiological, or neurological disability, infirmity, malformation, or disfigurement which is caused by injury, birth defect, or illness". In discussions with community organizations advocating the rights of gays and lesbians, I have indicated the staff's willingness to investigate complaints of AIDS related discrimination so that the jurisdictional question can be resolved with respect to the facts of an individual complaint.

It may interest you to learn that the International Association of Official Human Rights Agencies (IAOHRA) has scheduled a workshop on sexual preference an emerging human rights issue at its upcoming 38th annual conference to be held here in Anchorage July 6-10. The workshop is being conducted by Mary Fran Tryon, the Director of the Wisconsin Commission. As you know, Wisconsin is unique in its State Statute protecting the rights of gays and lesbians. You may wish to contact Ms. Tryon, who will be the moderator of that workshop, as an excellent source for information about the protections of State law. The State of Washington Human Rights Commission has also recently been very active in dealing with discrimination on the basis of age.

HLSKSTA

Benjamin Schatz
June 30, 1986
Page Two

I hope that this information is useful to you in your efforts to combat AIDS related discrimination.

Sincerely yours,

Janet L. Bradley

Janet L. Bradley
Executive Director

JLB/ljh

RICHARD F. CELESTE
Governor

OHIO CIVIL RIGHTS COMMISSION

CENTRAL OFFICE
220 Parsons Avenue
Columbus, Ohio 43266-0543
1-614-466-2785

REGIONAL OFFICES

NORTHEAST REGIONAL OFFICE
Frank Lausche Building, Suite 885
615 West Superior Avenue
Cleveland, Ohio 44113
1-216-622-3150

SOUTH N.E. REGIONAL OFFICE
Akron Government Center - Suite 205
161 South High Street
Akron, Ohio 44308
1-216-379-3100

NORTHWEST REGIONAL OFFICE
One Government Center - Room 236
Jackson and Erie Streets
Toledo, Ohio 43604
1-419-245-2900

SOUTHEAST REGIONAL OFFICE
220 Parsons Avenue
Columbus, Ohio 43266-0543
1-614-466-5928

SOUTHWEST REGIONAL OFFICE
200 Goodwill Complex
324 West 9th Street
Cincinnati, Ohio 45202
1-513-852-3366

NORTH S.W. REGIONAL OFFICE
800 Miami Tower
40 West 4th Street
Dayton, Ohio 45402
1-513-449-6500

7-18-86

July 14, 1986

Mr. Benjamin Schatz, Esquire
Director, AIDS Civil Rights Project
National Gay Rights Advocates
540 Castro Street
San Francisco, California 94114

Dear Mr. Schatz:

I am referring your letter to Mrs. Helen Ninos, Assistant Attorney General, Chief, Civil Rights Section, 50 West Broad Street, Columbus, Ohio 43215, for a reply in regards to Ohio's position on declaring that AIDS qualifies as a handicap under our States' anti-discrimination laws. Also, you may reach Mrs. Ninos by telephoning AC 614-466-7900.

Please feel free to contact this office, if you have any further questions.

Sincerely,

ROBERT D. BROWN,
EXECUTIVE DIRECTOR

Enclosure: OCRC literature

cc: Mrs. Helen Ninos,
Asst. Attorney General,
Chief, Civil Rights Section

RDB/ps

- We policy on AIDS to do - done by case basis - to determine if AIDS is a disability

SUPERIOR BUSINESS FORMS 328-4300

Reid June 11th

From

Mary Derlin
Unit Supervisor
WA St. Human Rights Com.
Spokane Office

INCLUDE MAIL STOPS

To

Benjamin Schatz
National Gay Rights Advocates
San Francisco CA 94114

ECON-O-GRAM
"To Provide Faster Service at Lower Cost"

Subject

Your May 30 letter

FILE #

☐ PLEASE REPLY BY ☐ NO REPLY REQUIRED

Message

I apologize for replying so informally, however I wanted to get some information to you as soon as possible. Enclosed find our AID's poster, an information pamphlet on our agency and a copy of our law.

I am forwarding your letter to our agency Director in Olympia.

SIGNATURE PHONE NO DATE

Mary Derlin 6-6-86

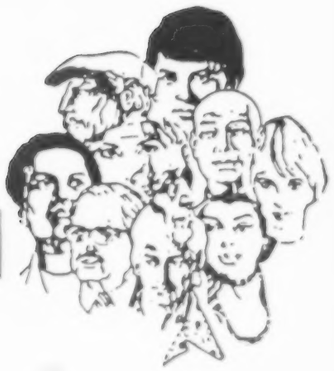
Reply

SIGNATURE PHONE NO DATE

FORM S.F. 1

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WASHINGTON
STATE
LAW PROHIBITS



Discrimination Based on AIDS

— IN EMPLOYMENT
— IN PLACES OF PUBLIC ACCOMMODATIONS, RESORT OR AMUSEMENT
— IN ALL CREDIT AND INSURANCE TRANSACTIONS
— IN REAL ESTATE RENTAL, LEASE OR SALE

Acquired Immune Deficiency Syndrome (AIDS) is a medical condition considered a disability under the Washington State Law Against Discrimination, RCW 49.60. Complaints are accepted and processed from:

-- Persons who have AIDS
— Persons perceived to have AIDS
— Persons perceived to be particularly susceptible because they are related to or reside with someone with AIDS
— Persons who have tested positive for HTLV 3 antibody.

any person

believing th he or she has been discriminated against in any of the situations mentioned above should contact the WASHINGTON STATE HUMAN RIGHTS COMMISSION

402 Evergreen Plaza Building
711 S. Capitol Way
Olympia, Washington 98504-3341
(206) 753-6770

Columbia Bldg. 4th Floor
1516 Second Avenue
Seattle, Washington 98101-1508
(206) 464-6500 Voice/TTY

West 905 Riverside Ave.
Suite 416
Spokane, Washington 99201-1099
(509) 456-4473 Voice/TTY

1714 S. 16th Ave.
Yakima, Washington 98902-5713
(509) 575-2772

A STEP TOWARD EQUALITY

WASHINGTON LAW AGAINST DISCRIMINATION

WASHINGTON STATE HUMAN RIGHTS COMMISSION

Revised February 1985

(RCW 49.60.010)

EQUAL OPPORTUNITY IS THE RIGHT OF EVERY INHABITANT OF THE STATE OF WASHINGTON

The Law and Its Administration

Discrimination Complaints

Anyone who claims to be aggrieved by an act of discrimination may file a complaint with the Washington State Human Rights Commission within six months of the occurrence of the act.

Once received, a complaint is investigated by the Commission's staff to determine whether the evidence supports a conclusion that there is reasonable cause for believing that discrimination has occurred.

If a reasonable cause finding is made, the staff of the Commission will attempt to resolve the complaint with the party (the Respondent) that has been charged with discrimination. If efforts to reach a voluntary settlement fail, the matter is referred to the Commission's legal counsel for presentation before an administrative law judge.

Regulations

The Washington State Human Rights Commission has been given the authority to adopt rules and regulations which carry out in more specific detail the provisions of the Washington Law Against Discrimination. The Commission's regulations control such practices as the advertising, printing, and publishing of employment applications; discrimination advertising in newspapers and other publications; and many others. Full compliance with the Law Against Discrimination and with the Commission's regulations is mandatory. Any person who files a complaint of discrimination against a person who has been found guilty of an unfair practice may be awarded damages, including damages for mental anguish and suffering, and may be assessed a civil penalty of up to $1,000 for each violation.

Information for the Handicapped

Any person who feels that he or she has been discriminated against because of a sensory, mental, or physical handicap may file a complaint with the Commission. Assistance in the preparation of a complaint is available to persons who are deaf, hearing impaired, or speech impaired through the Commission's TDD (telecommunications device for the deaf) machine. Persons who are blind or otherwise visually impaired may request that the Commission staff read and explain to them any written material they receive from the Commission.

Education and Consulting Services

Business, community groups, and individual citizens should feel free to contact any office of the Washington State Human Rights Commission for information on one's rights or how to comply with the Law Against Discrimination. Services are available in affirmative action program development, preemployment screening, instructional materials and workshops, and many other areas of concern. The Commission welcomes formal and informal inquiries, whether by telephone or in writing. Do not hesitate to call on the Commission's staff for assistance.

Offices

Seattle Washington 98104-1146
Second Avenue Plaza
Fourth Floor
(206) 464-6500 Voice/TDD

Spokane, Washington 99201-2293
W. 1020 Mallon
(509) 456-4473 Voice/TDD

Yakima, Washington 98902-3113
S. 15 16th Ave.
Suite 113
(509) 575-2772 Voice/TDD

Olympia, Washington 98504-3345
Capitol Way S.
(206) 753-6770

Reproduction of this publication for educational purposes is encouraged.

WASHINGTON STATE

LAW AGAINST DISCRIMINATION

CHAPTERS 49.60 & 49.74
REVISED CODE OF WASHINGTON

WASHINGTON STATE
HUMAN RIGHTS COMMISSION

402 Evergreen Plaza Building
OLYMPIA, WASHINGTON 98504

Telephone:
753-6770

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CHAPTER 49.60
LAW AGAINST DISCRIMINATION

49.60.010 Purpose of chapter. This chapter shall be known as the "law against discrimination". It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap; and the commission established hereunder is hereby given general jurisdiction and power for such purposes. [1985 c 185 § 1; 1973 1st ex.s. c 214 § 1; 1973 c 141 § 1; 1969 ex.s. c 167 § 1; 1957 c 37 § 1; 1949 c 183 § 1; Rem. Supp. 1949 § 7614-20.]

Severability——1969 ex.s. c 167: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1969 ex.s. c 167 § 10.]

Severability——1957 c 37: "If any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the remainder of such act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby." [1957 c 37 § 27.] This applies to RCW 49.60.010 through 49.60.050, 49.60.090, 49.60.120 and 49.60.180 through 49.60.310.

Severability——1949 c 183: "If any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the remainder of such act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby." [1949 c 183 § 13.] This applies to RCW 49.60.060 through 49.60.080, 49.60.100, 49.60.110, 49.60.130 through 49.60.170 and 49.60.320.

Urban renewal law——Discrimination prohibited: RCW 35.81.170.

49.60.020 Construction of chapter——Election of other remedies. The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination because of race, color, creed, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap, other than a law which purports to require or permit doing any act which is an unfair practice under this chapter. Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his civil rights. [1973 1st ex.s. c 214 § 2; 1973 c 141 § 2; 1957 c 37 § 2; 1949 c 183 § 12; Rem. Supp. 1949 § 7614-30.]

49.60.030 Freedom from discrimination——Declaration of civil rights. (1) The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical handicap is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: *Provided*, That a practice which is not unlawful under RCW 48.30.300, 48.44.220, or 48.46.370 does not constitute an unfair practice for the purposes of this subparagraph; and

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this

section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, national origin or lawful business relationship: *Provided however*, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices.

(2) Any person deeming himself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, to recover the actual damages sustained by him, or both, together with the cost of suit including a reasonable attorney's fees or any other remedy authorized by this chapter or the United States Civil Rights Act of 1964; and

(3) Notwithstanding any other provisions of this chapter, any act prohibited by this chapter related to sex discrimination or discriminatory boycotts or blacklists which is committed in the course of trade or commerce in the state of Washington as defined in the Consumer Protection Act, chapter 19.86 RCW, shall be deemed an unfair practice within the meaning of RCW 19.86.020 and 19.86.030 and subject to all the provisions of chapter 19.86 RCW as now or hereafter amended. [1984 c 32 § 2; 1979 c 127 § 2; 1977 ex.s. c 192 § 1; 1974 ex.s. c 32 § 1; 1973 1st ex.s. c 214 § 3; 1973 c 141 § 3; 1969 ex.s. c 167 § 2; 1957 c 37 § 3; 1949 c 183 § 2; Rem. Supp. 1949 § 7614-21.]

Severability——1969 ex.s. c 167: See note following RCW 49.60.010.

Severability——1957 c 37: See note following RCW 49.60.010.

Severability——1949 c 183: See note following RCW 49.60.010.

49.60.040 Definitions. As used in this chapter:

"Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any

owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof;

"Commission" means the Washington state human rights commission;

"Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit;

"Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person;

"Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment;

"Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer;

"National origin" includes "ancestry";

"Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, or with any sensory, mental, or physical handicap, or a blind or deaf person using a trained dog guide, to be treated as not welcome, accepted, desired, or solicited;

"Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services,

or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: *Provided*, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution;

"Real property" includes buildings, structures, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein;

"Real estate transaction" includes the sale, exchange, purchase, rental, or lease of real property;

"Sex" means gender.

"Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

[1985 c 203 § 2; 1985 c 185 § 2; 1979 c 127 § 3; 1973 c 141 § 4; 1969 ex.s. c 167 § 3; 1961 c 103 § 1; 1957 c 37 § 4; 1949 c 183 § 3; Rem. Supp. 1949 § 7614–22.]

Reviser's note: This section was amended by 1985 c 185 § 2 and by 1985 c 203 § 2, each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Severability——1969 ex.s. c 167: See note following RCW 49.60.010.

Construction——1961 c 103: "Nothing herein shall be construed to render any person or corporation liable for breach of preexisting contracts by reason of compliance by such person or corporation with this act." [1961 c 103 § 4.] This applies to the 1961 amendments to RCW 49.60.040, 68.20.110 and 84.36.020.

Severability——1957 c 37: See note following RCW 49.60.010.

Severability——1949 c 183: See note following RCW 49.60.010.

49.60.050 Commission created. There is created the "Washington state human rights commission," which shall be composed of five members to be appointed by the governor with the advice and consent of the senate, one of whom shall be designated as chairperson by the governor. [1985 c 185 § 3; 1981 c 338 § 9; 1957 c 37 § 5; 1955 c 270 § 2. Prior: 1949 c 183 § 4, part; Rem. Supp. 1949 § 7614–23, part.]

Reviser's note——Sunset Act application: The human rights commission is subject to review, termination, and possible extension under chapter 43.131 RCW, the Sunset Act. See RCW 43.131.327. RCW 49.60.050 through 49.60.170 and 49.60.226 through 49.60.320 are scheduled for future repeal under RCW 43.131.328.

49.60.051 Board name changed to Washington State Human Rights Commission. From and after August 9, 1971 the "Washington State Board Against Discrimination" shall be known and designated as the "Washington State Human Rights Commission". [1971 ex.s. c 52 § 2.]

Sunset Act application: See note following RCW 49.60.050.

49.60.060 Membership of commission. One of the original members of the commission shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill

a vacancy shall be appointed only for the unexpired term of the member whom the individual succeeds.

A member shall be eligible for reappointment.

A vacancy in the commission shall be filled within thirty days, the remaining members to exercise all powers of the commission.

Any member of the commission may be removed by the governor for inefficiency, neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard thereon. [1985 c 185 § 4; 1955 c 270 § 3. Prior: 1949 c 183 § 4, part; Rem. Supp. 1949 § 7614–23, part.]

Sunset Act application: See note following RCW 49.60.050.

49.60.070 Compensation and reimbursement for travel expenses of commission members. Each member of the commission shall be compensated in accordance with RCW 43.03.250 and, while in session or on official business, shall receive reimbursement for travel expenses incurred during such time in accordance with RCW 43.03.050 and 43.03.060. [1985 c 185 § 5; 1984 c 287 § 98; 1975–'76 2nd ex.s. c 34 § 145; 1955 c 270 § 4. Prior: 1949 c 183 § 4, part; Rem. Supp. 1949 § 7614–23, part.]

Sunset Act application: See note following RCW 49.60.050.

Legislative findings——Severability——Effective date——1984 c 287: See notes following RCW 43.03.220.

Effective date——Severability——1975–'76 2nd ex.s. c 34: See notes following RCW 2.08.115.

49.60.080 Official seal. The commission shall adopt an official seal, which shall be judicially noticed. [1985 c 185 § 6; 1955 c 270 § 5. Prior: (i) 1949 c 183 § 4, part; Rem. Supp. 1949 § 7614–23, part. (ii) 1949 c 183 § 6, part; Rem. Supp. 1949 § 7614–25, part.]

Sunset Act application: See note following RCW 49.60.050.

49.60.090 Offices of commission. The principal office of the commission shall be in the city of Olympia, but it may meet and exercise any or all of its powers at any other place in the state, and may establish such district offices as it deems necessary. [1985 c 185 § 7; 1957 c 37 § 6; 1955 c 270 § 6. Prior: (i) 1949 c 183 § 4, part; Rem. Supp. 1949 § 7614–23, part. (ii) 1949 c 183 § 6, part; Rem. Supp. 1949 § 7614–25, part.]

Sunset Act application: See note following RCW 49.60.050.

49.60.100 Reports of commission. The commission, at the close of each fiscal year, shall report to the governor, describing the investigations, proceedings, and hearings it has conducted and their outcome, the decisions it has rendered, the recommendations it has issued, and the other work performed by it, and shall make such recommendations for further legislation as may appear desirable. The commission may present its reports to the legislature; the commission's reports shall be made available upon request. [1985 c 185 § 8; 1977 c 75 § 74; 1955 c 270 § 7. Prior: 1949 c 183 § 4, part; Rem. Supp. 1949 § 7614-23, part.]

Sunset Act application: See note following RCW 49.60.050.

49.60.110 Commission to formulate policies. The commission shall formulate policies to effectuate the purposes of this chapter and may make recommendations to agencies and officers of the state or local subdivisions of government in aid of such policies and purposes. [1985 c 185 § 9; 1949 c 183 § 5; Rem. Supp. 1949 § 7614-24.]

Sunset Act application: See note following RCW 49.60.050.

49.60.120 Certain powers and duties of commission. The commission shall have the functions, powers and duties:

(1) To appoint an executive secretary and chief examiner, and such investigators, examiners, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(2) To obtain upon request and utilize the services of all governmental departments and agencies.

(3) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this chapter, and the policies and practices of the commission in connection therewith.

(4) To receive, investigate, and pass upon complaints alleging unfair practices as defined in this chapter.

(5) To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of sex, race, creed, color, national origin, marital status, age, or the presence of any sensory, mental, or physical handicap.

(6) To make such technical studies as are appropriate to effectuate the purposes and policies of this chapter and to publish and distribute the reports of such studies.

(7) To cooperate and act jointly or by division of labor with the United States or other states, and with political subdivisions of the state of Washington and their respective human rights agencies to carry out the purposes of this chapter. However, the powers which may be exercised by the commission under this subsection permit investigations and complaint dispositions only if the investigations are designed to reveal, or the complaint deals only with, allegations which, if proven, would constitute unfair practices under this chapter. The commission may perform such services for these agencies and be reimbursed therefor.

(8) To foster good relations between minority and majority population groups of the state through seminars, conferences, educational programs, and other intergroup relations activities. [1985 c 185 § 10; 1973 1st ex.s. c 214 § 4; 1973 c 141 § 7; 1971 ex.s. c 81 § 1; 1957 c 37 § 7; 1955 c 270 § 8. Prior: 1949 c 183 § 6, part; Rem. Supp. 1949 § 7614-25, part.]

Sunset Act application: See note following RCW 49.60.050.

Effective date——1971 ex.s. c 81: "The effective date of this act shall be July 1, 1971." [1971 ex.s. c 81 § 6.] "this act" consists of RCW 49.60.120, 49.60.130, 49.60.180, 49.60.190, and 49.60.200.

Human rights commission to investigate unlawful use of refueling services for disabled: RCW 70.84.090.

49.60.130 May create advisory agencies and conciliation councils. The commission has power to create such advisory agencies and conciliation councils, local, regional, or state-wide, as in its judgment will aid in effectuating the purposes of this chapter. The commission may empower them to study the problems of discrimination in all or specific fields of human relationships or in specific instances of discrimination because of sex, race, creed, color, national origin, marital status, age, or the presence of any sensory, mental, or physical handicap; to foster through community effort or otherwise good will, cooperation, and conciliation among the groups and elements of the population of the state, and to make recommendations to the commission for the development of policies and procedures in general and in specific instances, and

for programs of formal and informal education which the commission may recommend to the appropriate state agency.

Such advisory agencies and conciliation councils shall be composed of representative citizens, serving without pay, but with reimbursement for travel expenses in accordance with RCW 43.03.050 and 43-.03.060 as now existing or hereafter amended, and the commission may make provision for technical and clerical assistance to such agencies and councils and for the expenses of such assistance. The commission may use organizations specifically experienced in dealing with questions of discrimination. [1985 c 185 § 11; 1975-'76 2nd ex.s. c 34 § 146; 1973 1st ex.s. c 214 § 5; 1973 c 141 § 8; 1971 ex.s. c 81 § 2; 1955 c 270 § 9. Prior: 1949 c 183 § 6, part; Rem. Supp. 1949 § 7614-25, part.]

Sunset Act application: See note following RCW 49.60.050.

Effective date——Severability——1975-'76 2nd ex.s. c 34: See notes following RCW 2.08.115.

Effective date——1971 ex.s. c 81: See note following RCW 49.60.120.

49.60.140 Commission may hold hearings and subpoena witnesses. The commission has power to hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under investigation or in question before the commission. The commission may make rules as to the issuance of subpoenas by individual members, as to service of complaints, decisions, orders, recommendations and other process or papers of the commission, its member, agent, or agency, either personally or by registered mail, return receipt requested, or by leaving a copy thereof at the principal office or place of business of the person required to be served. The return post office receipt, when service is by registered mail, shall be proof of service of the same. [1985 c 185 § 12; 1955 c 270 § 10. Prior: 1949 c 183 § 6, part; Rem. Supp. 1949 § 7614-25, part.]

Sunset Act application: See note following RCW 49.60.050.

49.60.150 Witnesses compelled to testify. No person shall be excused from attending and testifying or from producing records, correspondence,

documents or other evidence in obedience to the subpoena of the commission or of any individual member, on the ground that the testimony or evidence required of the person may tend to incriminate or subject the person to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which the person is compelled, after having claimed the privilege against self-incrimination, to testify or produce evidence, except that such person so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. The immunity herein provided shall extend only to natural persons so compelled to testify. [1985 c 185 § 13; 1955 c 270 § 11. Prior: 1949 c 183 § 6, part; Rem. Supp. 1949 § 7614-25, part.]

Sunset Act application: See note following RCW 49.60.050.

49.60.160 Refusals may be punished as contempt of court. In case of contumacy or refusal to obey a subpoena issued to any person, the superior court of any county within the jurisdiction of which the investigation, proceeding, or hearing is carried on or within the jurisdiction of which the person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the commission shall have jurisdiction to issue to such person an order requiring such person to appear before the commission, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof. [1985 c 185 § 14; 1955 c 270 § 12. Prior: 1949 c 183 § 6, part; Rem. Supp. 1949 § 7614-25, part.]

Sunset Act application: See note following RCW 49.60.050.

49.60.170 Witness fees——Deposition fees. Witnesses before the commission, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of this state. Witnesses whose depositions are taken and the person taking the same shall be entitled to same fees as are paid for like services in the courts of the state. [1985 c 185 § 15; 1955 c 270 § 13. Prior: 1949 c 183 § 6, part; Rem. Supp. 1949 § 7614-25, part.]

Sunset Act application: See note following RCW 49.60.050.

Courts of record——Witnesses: Chapter 2.40 RCW.

Discovery and depositions: Title 5 RCW; see also **Rules of Court**, CR 26-37.

49.60.175 Unfair practices of financial institutions. It shall be an unfair practice to use the sex, race, creed, color, national origin, marital status, or the presence of any sensory, mental, or physical handicap of any person concerning an application for credit in any credit transaction to determine the credit worthiness of an applicant. [1979 c 127 § 4; 1977 ex.s. c 301 § 14; 1973 c 141 § 9; 1959 c 68 § 1.]

Fairness in lending act: RCW 30.04.500 through 30.04.515.

49.60.176 Unfair practices with respect to credit transactions. (1) It is an unfair practice for any person whether acting for himself or another in connection with any credit transaction because of race, creed, color, national origin, sex, marital status, or the presence of any sensory, mental, or physical handicap:

(a) To deny credit to any person;

(b) To increase the charges or fees for or collateral required to secure any credit extended to any person;

(c) To restrict the amount or use of credit extended or to impose different terms or conditions with respect to the credit extended to any person or any item or service related thereto;

(d) To attempt to do any of the unfair practices defined in this section.

(2) Nothing in this section shall prohibit any party to a credit transaction from considering the credit history of any individual applicant.

(3) Further, nothing in this section shall prohibit any party to a credit transaction from considering the application of the community property law to the individual case or from taking reasonable action thereon. [1979 c 127 § 5; 1973 c 141 § 5.]

49.60.178 Unfair practices with respect to insurance transactions. It is an unfair practice for any person whether acting for himself or another in connection with an insurance transaction or transaction with a health maintenance organization to cancel or fail or refuse to issue or renew insurance or a health maintenance agreement to any person

because of sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap: *Provided*, That a practice which is not unlawful under RCW 48.30-.300, 48.44.220, or 48.46.370 does not constitute an unfair practice for the purposes of this section. For the purposes of this section, "insurance transaction" is defined in RCW 48.01.060, health maintenance agreement is defined in RCW 48.46.020, and "health maintenance organization" is defined in RCW 48.46.020.

The fact that such unfair practice may also be a violation of chapter 48.30, 48.44, or 48.46 RCW does not constitute a defense to an action brought under this section.

The insurance commissioner, under RCW 48.30-.300, and the human rights commission, under chapter 49.60 RCW, shall have concurrent jurisdiction under this section and shall enter into a working agreement as to procedure to be followed in complaints under this section. [1984 c 32 § 1; 1979 c 127 § 6; 1974 ex.s. c 32 § 2; 1973 c 141 § 6.]

49.60.180 Unfair practices of employer defined. It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, unless based upon a bona fide occupational qualification: *Provided*, That the prohibition against discrimination because of such handicap shall not apply if the particular disability prevents the proper performance of the particular worker involved.

(2) To discharge or bar any person from employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap: *Provided*, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to

be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: *Provided*, Nothing contained herein shall prohibit advertising in a foreign language. [1985 c 185 § 16; 1973 1st ex.s. c 214 § 6; 1973 c 141 § 10; 1971 ex.s. c 81 § 3; 1961 c 100 § 1; 1957 c 37 § 9. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

Effective date——1971 ex.s. c 81: See note following RCW 49.60.120.

Element of age not to affect apprenticeship agreements: RCW 49.04.910.

Labor——Prohibited practices: Chapter 49.44 RCW.

Unfair practices in employment because of age of employee or applicant: RCW 49.44.090.

49.60.190 Unfair practices of labor unions defined. It is an unfair practice for any labor union or labor organization:

(1) To deny membership and full membership rights and privileges to any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.

(2) To expel from membership any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.

(3) To discriminate against any member, employer, employee, or other person to whom a duty of representation is owed because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap. [1985 c 185 § 17; 1973 1st ex.s. c 214 § 8; 1973 c 141 § 11; 1971 ex.s. c 81 § 4; 1961 c 100 § 2; 1957 c 37 § 10. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

Effective date——1971 ex.s. c 81: See note following RCW 49.60.120.

Element of age not to affect apprenticeship agreements: RCW 49.04.910.

49.60.200 Unfair practices of employment agencies. It is an unfair practice for any employment agency to fail or refuse to classify properly or refer for employment, or otherwise to discriminate against, an individual because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, or to print or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification or discrimination as to age, sex, race, creed, color, or national origin, or the presence of any sensory, mental, or physical handicap, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: *Provided*, Nothing contained herein shall prohibit advertising in a foreign language. [1973 1st ex.s. c 214 § 9; 1973 c 141 § 12; 1971 ex.s. c 81 § 5; 1961 c 100 § 3; 1957 c 37 § 11. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

Effective date——1971 ex.s. c 81: See note following RCW 49.60.120.

Element of age not to affect apprenticeship agreements: RCW 49.04.910.

Fraud by employment agent: RCW 49.44.050.

49.60.205 Age discrimination——Limitation. No person shall be considered to have committed an unfair practice on the basis of age discrimination unless the practice discriminates against a person between the age of forty and seventy years and violates RCW 49.44.090. It is a defense to any complaint of an unfair practice of age discrimination that the practice does not violate RCW 49.44.090. [1985 c 185 § 28.]

49.60.210 Unfair to discriminate against person opposing unfair practice. It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter. [1985

c 185 § 18; 1957 c 37 § 12. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

49.60.215 Unfair practices of places of public resort, accommodation, assemblage, amusement. It shall be an unfair practice for any person or his agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sex, the presence of any sensory, mental, or physical handicap, or the use of a trained dog guide by a blind, deaf, or physically disabled person: *Provided*, That this section shall not be construed to require structural changes, modifications, or additions to make any place accessible to a handicapped person except as otherwise required by law: *Provided*, That behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practice. [1985 c 203 § 1; 1985 c 90 § 6; 1979 c 127 § 7; 1957 c 37 § 14.]

Reviser's note: This section was amended by 1985 c 90 § 6 and by 1985 c 203 § 1; each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Denial of civil rights: RCW 9.91.010.

49.60.220 Unfair practice to aid violation. It is an unfair practice for any person to aid, abet, encourage, or incite the commission of any unfair practice, or to attempt to obstruct or prevent any other person from complying with the provisions of this chapter or any order issued thereunder. [1957 c 37 § 13. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

49.60.222 Unfair practices with respect to real estate transactions, facilities, or services. It is an unfair practice for any person, whether acting for himself or another, because of sex, marital status, race, creed, color, national origin, the presence of

any sensory, mental, or physical handicap, or the use of a trained dog guide by a blind or deaf person:

(1) To refuse to engage in a real estate transaction with a person;

(2) To discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;

(3) To refuse to receive or to fail to transmit a bona fide offer to engage in a real estate transaction from a person;

(4) To refuse to negotiate for a real estate transaction with a person;

(5) To represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to fail to bring a property listing to his attention, or to refuse to permit him to inspect real property;

(6) To print, circulate, post, or mail, or cause to be so published a statement, advertisement, or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto;

(7) To offer, solicit, accept, use, or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith;

(8) To expel a person from occupancy of real property;

(9) To discriminate in the course of negotiating, executing, or financing a real estate transaction whether by mortgage, deed of trust, contract, or other instrument imposing a lien or other security in real property, or in negotiating or executing any item or service related thereto including issuance of title insurance, mortgage insurance, loan guarantee, or other aspect of the transaction. Nothing in this section shall limit the effect of RCW 49.60.176 relating to unfair practices in credit transactions; or

(10) To attempt to do any of the unfair practices defined in this section.

Notwithstanding any other provision of law, it shall not be an unfair practice or a denial of civil rights for any public or private educational institution to separate the sexes or give preference to or

limit use of dormitories, residence halls, or other student housing to persons of one sex or to make distinctions on the basis of marital or family status.

This section shall not be construed to require structural changes, modifications, or additions to make facilities accessible to a handicapped person except as otherwise required by law. Nothing in this section affects the rights and responsibilities of landlords and tenants pursuant to chapter 59.18 RCW. [1979 c 127 § 8; 1975 1st ex.s. c 145 § 1; 1973 c 141 § 13; 1969 ex.s. c 167 § 4.]

Severability——1969 ex.s. c 167: See note following RCW 49.60.010.

49.60.223 Unfair practice to induce sale or rental of real property by representations regarding entry into neighborhood of persons of particular race, handicap, etc. It is an unfair practice for any person, for profit, to induce or attempt to induce any person to sell or rent any real property by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, creed, color, national origin, or with any sensory, mental, or physical handicap. [1979 c 127 § 9; 1969 ex.s. c 167 § 5.]

Severability——1969 ex.s. c 167: See note following RCW 49.60.010.

49.60.224 Provisions of real property contract restricting conveyance, encumbrance, occupancy, or use to persons of particular race, handicap, etc., void——Unfair practice. (1) Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease thereof to individuals of a specified race, creed, color, national origin, or with any sensory, mental, or physical handicap, and every condition, restriction, or prohibition, including a right of entry or possibility of reverter, which directly or indirectly limits the use or occupancy of real property on the basis of race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap is void.

(2) It is an unfair practice to insert in a written instrument relating to real property a provision that is void under this section or to honor or attempt to honor such a provision in the chain of title. [1979 c 127 § 10; 1969 ex.s. c 167 § 6.]

Severability——1969 ex.s. c 167: See note following RCW 49.60.010.

49.60.225 Award to complainant for loss of rights secured. When a determination has been made under RCW 49.60.250 that an unfair practice involving real property has been committed, the commission may, in addition to other relief authorized by RCW 49.60.250, award the complainant up to one thousand dollars for loss of the right secured by RCW 49.60.010, 49.60.030, 49.60.040, and 49.60.222 through 49.60.226, as now or hereafter amended, to be free from discrimination in real property transactions because of sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap. Enforcement of the order and appeal therefrom by the complainant or respondent shall be made as provided in RCW 49.60.260 and 49.60.270. [1985 c 185 § 19; 1979 c 127 § 11; 1973 c 141 § 14; 1969 ex.s. c 167 § 7.]

Severability——1969 ex.s. c 167: See note following RCW 49.60.010.

49.60.226 Cooperative agreements between units of government for processing complaints. The commission and units of local government administering ordinances with provisions similar to the real estate provisions of the law against discrimination are authorized and directed to enter into cooperative agreements or arrangements for receiving and processing complaints so that duplication of functions shall be minimized and multiple hearings avoided. No complainant may secure relief from more than one instrumentality of state, or local government, nor shall any relief be granted by any state or local instrumentality if relief has been granted or proceedings are continuing in any federal agency, court, or instrumentality, unless such proceedings have been deferred pending state action. [1985 c 185 § 20; 1969 ex.s. c 167 § 8.]

Sunset Act application: See note following RCW 49.60.030.

Severability——1969 ex.s. c 167: See note following RCW 49.60.010.

49.60.230 Complaint may be filed with commission. Who may file a complaint:

(1) Any person claiming to be aggrieved by an alleged unfair practice may, personally or by his or

her attorney, make, sign, and file with the commission a complaint in writing under oath. The complaint shall state the name and address of the person alleged to have committed the unfair practice and the particulars thereof, and contain such other information as may be required by the commission.

(2) Whenever it has reason to believe that any person has been engaged or is engaging in an unfair practice, the commission may issue a complaint.

(3) Any employer or principal whose employees, or agents, or any of them, refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a written complaint under oath asking for assistance by conciliation or other remedial action.

Any complaint filed pursuant to this section must be so filed within six months after the alleged act of discrimination. [1985 c 185 § 21; 1957 c 37 § 16; 1955 c 270 § 15. Prior: 1949 c 183 § 8, part; Rem. Supp. 1949 § 7614-27, part.]

Sunset Act application: See note following RCW 49.60.050.

49.60.240 Complaint investigated——Conference, conciliation——Agreement, findings. After the filing of any complaint, the chairperson of the commission shall refer it to the appropriate section of the commission's staff for prompt investigation and ascertainment of the facts alleged in the complaint. The investigation shall be limited to the alleged facts contained in the complaint. The results of the investigation shall be reduced to written findings of fact, and a finding shall be made that there is or that there is not reasonable cause for believing that an unfair practice has been or is being committed. A copy of said findings shall be furnished to the complainant and to the person named in such complaint, hereinafter referred to as the respondent.

If the finding is made that there is reasonable cause for believing that an unfair practice has been or is being committed, the commission's staff shall immediately endeavor to eliminate the unfair practice by conference, conciliation and persuasion.

If an agreement is reached for the elimination of such unfair practice as a result of such conference, conciliation and persuasion, the agreement shall be reduced to writing and signed by the respondent, and an order shall be entered by the commission setting forth the terms of said agreement. No order

shall be entered by the commission at this stage of the proceedings except upon such written agreement.

If no such agreement can be reached, a finding to that effect shall be made and reduced to writing, with a copy thereof furnished to the complainant and the respondent. [1985 c 185 § 22; 1981 c 259 § 1; 1957 c 37 § 17; 1955 c 270 § 16. Prior: 1949 c 183 § 8, part; Rem. Supp. 1949 § 7614-27, part.]

Sunset Act application: See note following RCW 49.60.050.

RCW 49.60.240 through 49.60.280 applicable to complaints concerning unlawful use of refueling services for disabled RCW 70.84.090.

49.60.250 Hearing of complaint by administrative law judge——Order. (1) In case of failure to reach an agreement for the elimination of such unfair practice, and upon the entry of findings to that effect, the entire file, including the complaint and any and all findings made, shall be certified to the chairperson of the commission. The chairperson of the commission shall thereupon request the appointment of an administrative law judge under Title 34 RCW to hear the complaint and shall cause to be issued and served in the name of the commission a written notice, together with a copy of the complaint, as the same may have been amended, requiring the respondent to answer the charges of the complaint at a hearing before the administrative law judge, at a time and place to be specified in such notice.

(2) The place of any such hearing may be the office of the commission or another place designated by it. The case in support of the complaint shall be presented at the hearing by counsel for the commission: *Provided*, That the complainant may retain independent counsel and submit testimony and be fully heard. No member or employee of the commission who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall the member or employee participate in the deliberations of the administrative law judge in such case. Any endeavors or negotiations for conciliation shall not be received in evidence.

(3) The respondent shall file a written answer to the complaint and appear at the hearing in person or otherwise, with or without counsel, and submit

testimony and be fully heard. The respondent has the right to cross-examine the complainant.

(4) The administrative law judge conducting any hearing may permit reasonable amendment to any complaint or answer. Testimony taken at the hearing shall be under oath and recorded.

(5) If, upon all the evidence, the administrative law judge finds that the respondent has engaged in any unfair practice, the administrative law judge shall state findings of fact and shall issue and file with the commission and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair practice and to take such affirmative action, including, (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, an admission or restoration to full membership rights in any respondent organization, or to take such other action as, in the judgment of the administrative law judge, will effectuate the purposes of this chapter, including action that could be ordered by a court, except that damages for humiliation and mental suffering shall not exceed one thousand dollars, and including a requirement for report of the matter on compliance.

(6) The final order of the administrative law judge shall include a notice to the parties of the right to obtain judicial review of the order by appeal in accordance with the provisions of RCW 34.04.130 or 34.04.133, and that such appeal must be served and filed within thirty days after the service of the order on the parties.

(7) If, upon all the evidence, the administrative law judge finds that the respondent has not engaged in any alleged unfair practice, the administrative law judge shall state findings of fact and shall similarly issue and file an order dismissing the complaint.

(8) An order dismissing a complaint may include an award of reasonable attorneys' fees in favor of the respondent if the administrative law judge concludes that the complaint was frivolous, unreasonable, or groundless.

(9) The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure. [1985 c 185 § 23; 1983 c 293 § 1; 1981 c 259 § 2; 1957 c 37 § 18; 1955 c 270 § 17. Prior: 1949 c 183 § 8, part; Rem. Supp. 1949 § 7614-27, part.]

Sunset Act application: See note following RCW 49.60.050.

Effective date——1981 c 259: "Sections 2, 3, 4 and 5 of this 1981 act shall take effect upon the enactment of House Bill 101, 1981 Regular Session." [1981 c 259 § 7.] Sections 2, 3, 4 and 5 of 1981 c 259 consist of amendments to RCW 49.60.250, 49.60.260, 49.60.270 and the enactment of RCW 49.60.330, respectively. House Bill 101 was enacted as chapter 67, Laws of 1981. It was signed by the governor on April 25, 1981. Since chapter 67, Laws of 1981 took effect on July 1, 1982, the apparent intent is for sections 2, 3, 4 and 5 of 1981 c 259 to take effect on that date. For effective date of 1981 c 67, see note following RCW 34.12.010.

Assignment of administrative law judge for human rights commission proceedings: RCW 34.12.037.

49.60.260 Court may enforce orders of administrative law judge——Appeal from court order. (1) The commission shall petition the court within the county wherein any unfair practice occurred or wherein any person charged with an unfair practice resides or transacts business for the enforcement of any final order which is not complied with and is issued by the commission or an administrative law judge under the provisions of this chapter and for appropriate temporary relief or a restraining order, and shall certify and file in court the final order sought to be enforced. Within five days after filing such petition in court, the commission shall cause a notice of the petition to be sent by registered mail to all parties or their representatives.

(2) From the time the petition is filed, the court shall have jurisdiction of the proceedings and of the questions determined thereon, and shall have the power to grant such temporary relief or restraining order as it deems just and suitable.

(3) If the petition shows that there is a final order issued by the commission or administrative law judge under RCW 49.60.240 or 49.60.250 and that the order has not been complied with in whole or in part, the court shall issue an order directing the person who is alleged to have not complied with the administrative order to appear in court at a time designated in the order, not less than ten days from the date thereof, and show cause why the administrative order should not be enforced according to the terms. The commission shall immediately serve the person with a copy of the court order and the petition.

(4) The administrative order shall be enforced by the court if the person does not appear, or if the person appears and the court finds that:

(a) The order is regular on its face;

(b) The order has not been complied with; and

(c) The person's answer discloses no valid reason why the order should not be enforced, or that the reason given in the person's answer could have been raised by review under RCW 34.04.130, and the person has given no valid excuse for failing to use that remedy.

(5) The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to a review by the supreme court or the court of appeals, on appeal, by either party, irrespective of the nature of the decree or judgment. Such appeal shall be taken and prosecuted in the same manner and form and with the same effect as is provided in other cases of appeal to the supreme court or the court of appeals, and the record so certified shall contain all that was before the lower court. [1985 c 185 § 24; 1981 c 259 § 3; 1971 c 81 § 118; 1957 c 37 § 21. Prior: 1949 c 183 § 9, part; Rem Supp. 1949 § 7614–27A, part.]

Rules of court: Cf. RAP 2.2, 18.22.

Sunset Act application: See note following RCW 49.60.050.

Effective date——1981 c 259: See note following RCW 49.60.250.

49.60.270 Appeal from orders of administrative law judge. Any respondent or complainant, including the commission, aggrieved by a final order of an administrative law judge may obtain judicial review of such order as provided under the administrative procedure act, chapter 34.04 RCW. From the time a petition for review is filed, the court has jurisdiction to grant to any party such temporary relief or restraining order as it deems just and suitable. If the court affirms the order, it shall enter a judgment and decree enforcing the order as affirmed. [1985 c 185 § 25; 1981 c 259 § 4; 1957 c 37 § 22. Prior: 1949 c 183 § 9, part; Rem. Supp. 1949 § 7614–27A, part.]

Sunset Act application: See note following RCW 49.60.050.

Effective date——1981 c 259: See note following RCW 49.60.250.

49.60.280 Court shall expeditiously hear and determine. Petitions filed under RCW 49.60.260 and 49.60.270 shall be heard expeditiously and determined upon the transcript filed, without requirement of printing. Hearings in the court under this

chapter shall take precedence over all other matters, except matters of the same character. [1957 c 37 § 23. Prior: 1949 c 183 § 9, part; Rem. Supp. 1949 § 7614–27A, part.]

Sunset Act application: See note following RCW 49.60.050.

49.60.310 Misdemeanor to interfere with or resist commission. Any person who wilfully resists, prevents, impedes, or interferes with the commission or any of its members or representatives in the performance of duty under this chapter, or who wilfully violates an order of the commission, is guilty of a misdemeanor; but procedure for the review of the order shall not be deemed to be such wilful conduct. [1985 c 185 § 26; 1961 c 100 § 4; 1957 c 37 § 26; 1949 c 183 § 10; Rem. Supp. 1949 § 7614–28.]

Sunset Act application: See note following RCW 49.60.050.

49.60.320 Governor may act on orders against state or political subdivisions. In any case in which the commission shall issue an order against any political or civil subdivision of the state, or any agency, or instrumentality of the state or of the foregoing, or any officer or employee thereof, the commission shall transmit a copy of such order to the governor of the state. The governor shall take such action to secure compliance with such order as the governor deems necessary. [1985 c 185 § 27; 1949 c 183 § 11; Rem. Supp. 1949 § 7614–29.]

Sunset Act application: See note following RCW 49.60.050.

49.60.330 First class cities of over one hundred twenty-five thousand population——Administrative remedies authorized. Any city classified as a first class city under RCW 35.01.010 with over one hundred twenty five thousand population may enact ordinances consistent with this chapter to provide administrative remedies for any form of discrimination proscribed by this chapter: *Provided*, That the imposition of such administrative remedies shall be subject to judicial review. [1983 c 5 § 2; 1981 c 259 § 5.]

Effective date——1981 c 259: See note following RCW 49.60.250.

Chapter 49.74
AFFIRMATIVE ACTION

Sections

49.74.005 Legislative findings——Purpose.
49.74.010 Commission.
49.74.020 Affirmative action rules——Noncompliance——Notification——Hearing.
49.74.030 Noncompliance——Conciliation——Order.
49.74.040 Failure to reach conciliation agreement——Administrative hearing——Appeal.
49.74.050 Superior court——Remedies.

49.74.005 Legislative findings——Purpose. Discrimination because of race, creed, color, national origin, age, sex, marital status, or the presence of any sensory, mental, or physical handicap is contrary to the findings of the legislature and public policy. The legislature finds and declares that racial minorities, women, persons in protected age groups, persons with disabilities, Vietnam-era veterans, and disabled veterans are underrepresented in Washington state government employment.

The purpose of this chapter is to provide for enforcement measures for affirmative action within Washington state government employment and institutions of higher education in order to eliminate such underrepresentation. [1985 c 365 § 7.]

49.74.010 Commission. As used in this chapter, "commission" means the Washington state human rights commission. [1985 c 365 § 8.]

49.74.020 Affirmative action rules——Noncompliance——Notification——Hearing. If the commission reasonably believes that a state agency, an institution of higher education, or the state patrol has failed to comply with an affirmative action rule adopted under RCW 28B.16.100, 41.06.150, or 43.43.340, the commission shall notify the director of the state agency, president of the institution of higher education, or chief of the Washington state patrol of the noncompliance, as well as the director of personnel or the director of the higher education personnel board, whichever is appropriate. The commission shall give the director of the state agency, president of the institution of higher education, or chief of the Washington state patrol an opportunity to be heard on the failure to comply. [1985 c 365 § 9.]

49.74.030 Noncompliance——Conciliation——Order. The commission in conjunction with the department of personnel, the higher education personnel board, or the state patrol, whichever is appropriate, shall attempt to resolve the noncompliance through conciliation. If an agreement is reached for the elimination of noncompliance, the agreement shall be reduced to writing and an order shall be issued by the commission setting forth the terms of the agreement. The noncomplying state agency, institution of higher education, or state patrol shall make a good faith effort to conciliate and make a full commitment to correct the noncompliance with any action that may be necessary to achieve compliance, provided such action is not inconsistent with the rules adopted under RCW 28B.16.100(20), 41.06.150(21), and 43.43.340(5), whichever is appropriate. [1985 c 365 § 10.]

49.74.040 Failure to reach conciliation agreement——Administrative hearing——Appeal. If no agreement can be reached under RCW 49.74.030, the commission may refer the matter to the administrative law judge for hearing pursuant to RCW 49.60.250. If the administrative law judge finds that the state agency, institution of higher education, or state patrol has not made a good faith effort to correct the noncompliance, the administrative law judge shall order the state agency, institution of higher education, or state patrol to comply with this chapter. The administrative law judge may order any action that may be necessary to achieve compliance, provided such action is not inconsistent with the rules adopted under RCW 28B.16.100(20), 41.06.150(21), and 43.43.340(5), whichever is appropriate.

An order by the administrative law judge may be appealed to superior court. [1985 c 365 § 11.]

49.74.050 Superior court——Remedies. If the superior court finds that the state agency, institution of higher education, or state patrol has not made a good faith effort to correct the noncompliance, the court, in addition to any other penalties and sanctions prescribed by law, shall order the state agency, institution of higher education, or state patrol to comply with this chapter. The court may require any action deemed appropriate by the court which is consistent with the intent of this chapter. [1985 c 365 § 12.]

RELATED STATUTES

49.44.090 Unfair practices in employment because of age of employee or applicant——Exceptions. It shall be an unfair practice:

(1) For an employer or licensing agency, because an individual is between the ages of forty and seventy, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment: *Provided*, That employers or licensing agencies may establish reasonable minimum and/or maximum age limits with respect to candidates for positions of employment, which positions are of such a nature as to require extraordinary physical effort, endurance, condition or training, subject to the approval of the executive secretary of the Washington state human rights commission or the director of labor and industries through the division of industrial relations.

(2) For any employer, licensing agency or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses any limitation, specification or discrimination respecting individuals between the ages of forty and seventy: *Provided*, That nothing herein shall forbid a requirement of disclosure of birth date upon any form of application for employment or by the production of a birth certificate or other sufficient evidence of the applicant's true age.

Nothing contained in this section or in RCW 49.60.180 as to age shall be construed to prevent the termination of the employment of any person who is physically unable to perform his duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of this section; nor shall anything in this section or in RCW 49.60.180 be deemed to preclude the varying of insurance coverages according to an employee's age; nor shall this section be construed as applying to any state, county, or city law enforcement agencies, or as superseding any law fixing or authorizing the establishment of reasonable minimum or maximum age limits with respect to candidates for certain positions in public employment which are of such a nature as to require extraordinary physical effort, or which for other reasons warrant consideration of age factors. [1985 c 185 § 30; 1983 c 293 § 2; 1961 c 100 § 5.]

Element of age not to affect apprenticeship agreements: RCW 49.04.910.

Unfair practices, discrimination because of age: RCW 49.60.180 through 49.60.205.

CHAPTER 70.124
ABUSE OF NURSING HOME PATIENTS

70.124.060 Liability of persons making reports. (1) A person participating in good faith in the making of a report pursuant to this chapter or testifying as to alleged patient abuse or neglect in a judicial proceeding shall in so doing be immune from any liability, civil or criminal, arising out of such reporting or testifying under any law of this state or its political subdivisions, and if such person is an employee of a nursing home or state hospital it shall be an unfair practice under chapter 49.60 RCW for the employer to dismiss said employee for such activity.

(2) Conduct conforming with the reporting requirements of this chapter shall not be deemed a violation of the confidential communication privilege of RCW 5.60.060 (3) or (4) or 18.83.110. Nothing in this chapter shall be construed as to supersede or abridge remedies provided in chapter 4.92 RCW. [1981 c 174 § 5; 1979 ex.s. c 228 § 6.]

WASHINGTON CONSTITUTION

Article IX
EDUCATION

§ 1 PREAMBLE. It is the paramount duty of the state to make ample provisions for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

Article XXXI
(Amendment 61)
SEX EQUALITY——RIGHTS AND RESPONSIBILITIES

Section 1 **Equality Not Denied Because of Sex.** Equality of rights and responsibility under the laws shall not be denied or abridged on account of sex.

CHRONOLOGY

1949	Law Against Discrimination in employment enacted. Covered discrimination because of race, creed, color or national origin.
1957	Public accommodations added.
1961	Age discrimination in employment added.
1969	Real estate transactions added.
1971	Sex discrimination in employment added.
1973	Credit transactions and insurance transactions added. Covers discrimination because of sex, marital status, race, creed, or national origin.
	Handicap discrimination in employment added.
	Sex and marital status discrimination in real estate transactions added.
	Marital status discrimination in employment added.
1979	Handicap discrimination in real estate transactions, public accommodations, credit, and insurance added.

HUMAN RIGHTS COMMISSION
STATE OF WASHINGTON

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711 S. Capitol Way
Olympia, Washington 98504-3341
(206) 753-6770

Broad Acres Bldg., 4th Floor
1601 Second Avenue
Seattle, Washington 98101-1589
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Yakima, Washington 98902-5713
(509) 575-2772

West 905 Riverside Ave.
Suite 416
Spokane, Washington 99201-1099
(509) 456-4473 Voice/TTY

HUMAN RIGHTS COMMISSION

TED SCHWINDEN, GOVERNOR
STATE OF MONTANA

July 28, 1986

Rec'd 8-1-86

Benjamin Schatz
National Gay Rights Advocates
540 Castro Street
San Francisco, CA 94114

Dear Mr. Schatz:

Please excuse the delay in my response. I have enclosed a copy of the Montana Human Rights Act regarding handicap including Section 49-4-101 et. seq. Montana Codes Annotated (hereinafter MCA) and 49-2-101, MCA, the definition of physical handicap is included at §§(16). Section 49-2-301, et. seq. prohibits discrimination based on a person's membership in a protected class, including physical handicap, and 49-3-201 et. seq. is the Governmental Code of Fair Practices which relates to the activities of a public entity.

The above mentioned sections prohibit discrimination based on a physical handicap or a perceived handicap. The Montana Human Rights Commission has informally taken the position that AIDS constitutes a handicap. This position has not been challenged either formally or informally. This includes the protection of persons with an AIDS related complex who would thereby be perceived to have the physical handicap of AIDS.

The Commission has promulgated rules regarding physical handicap discrimination as a reasonable demand of employment 24.9.1404 Administrative Rules of Montana (hereafter A.R.M.). I have enclosed a copy of that rule for your convenience. I have further included the Commission rule regarding unlawful, suspect and lawful pre-employment inquiries.

Again, please feel free to contact me if I can be of further assistance.

Very truly yours,

Janice Frankino Doggett
Staff Attorney
Human Rights Division

Enclosures

New Hampshire Commission for Human Rights

COMMISSIONERS

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KENNETH E. FREDETTE
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61 SOUTH SPRING STREET
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EXECUTIVE DIRECTOR

MERRYL GIBBS

DEPUTY DIRECTOR

SUSAN MCKEVITT

NEW HAMPSHIRE

June 23, 1986

Benjamin Schatz, Esq.
National Gay Rights Advocates
540 Castro Street
San Francisco, CA 94114

Dear Mr. Schatz:

After discussing your letter with the Commissioners, I wish to reply informally to your question as to whether AIDS-based discrimination is illegal under the New Hampshire anti-discrimination laws. A formal opinion will not be issued until there is an appropriate case before the Commission.

Enclosed you will find a copy of the New Hampshire Statute (RSA 354-A) which forbids discrimination on the basis of handicap in employment, housing and public accomodations. Handicap is defined in section 354-A:3(13). Also enclosed is Part Hum 405 of the Commission's rules. As you will see from this section, a covered handicap under New Hampshire law is any "permanent, long term, or chronic physical or mental impairment which substantially limits one or more major life activities." Hum 405.01(b). I believe there can be little question that AIDS is a covered handicp under this rule.

AIDS related complex and the presence of HTLV-III antibodies would be covered handicaps only if they substantially limited one or more major life activities for the individual in question. However, if an individual with one of these conditions was perceived by an employer or landlord as having AIDS and excluded from employment or housing for that reason, that individual would be covered under the handicap discrimination law.

Please let me know if you need any further information. Also, I would greatly appreciate your sending me a copy of the results of your survey when it is completed.

Very truly yours,

Merryl Gibbs

(Ms.) Merryl Gibbs
Executive Director

STATE OF CONNECTICUT

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

90 WASHINGTON STREET HARTFORD, CONNECTICUT 06106

IN REPLY
(203) 566-7108

July 22, 1986

Benjamin Schatz, Esquire
Director, AIDS Civil Rights Project
National Gay Rights Advocates
540 Castro Street
San Francisco, California 94114

Dear Mr. Schatz:

This letter responds to your inquiry of July 10 concerning the issue of AIDS-related, handicapped discrimination under state law.

The Connecticut Commission on Human Rights and Opportunities has accepted AIDS-related complaints under Connecticut's anti-discrimination laws prohibiting discrimination on the basis of physical disability. The types of discrimination prohibited under the relevant statutes are employment, housing, public accommodations, credit and state services. At this time the Commission has three AIDS related complaints pending before it.

If we can be of further assistance, please let us know.

Very truly yours,

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

By: Arthur L. Green
Director

ALG:syr
cc: Jurate L. Vaitkus
Assistant Director

STATE OF ILLINOIS
Department of Human Rights
100 West Randolph Street, Illinois Center, Suite 10-100
Chicago, Illinois 60601
312/917-6200

James R. Thompson
Governor

Joyce E. Tucker
Director

June 27, 1986

Benjamin Schatz, Esq.
Director, AIDS Civil Rights Project
National Gay Rights Advocates
540 Castro Street
San Francisco, CA 94114

Dear Mr. Schatz:

I have been asked by Director Joyce E. Tucker to respond to your May 30, 1986 inquiry concerning this Department's position on Acquired Immune Deficiency syndrome ("AIDS").

The Illinois Human Rights Act ("Act"), Ill. Rev. Stat. ch 68, Section 1-101 et seq., gives the Illinois Department of Human Rights ("Department") the authority to accept and investigate charges of unlawful discrimination as defined by the Act. Section 1-103(Q) of the Act defines unlawful discrimination to include discrimination against a person because of his handicap. The Department's Interpretive Rules on Handicap Discrimination state, in part, that a physical handicap is a physical characteristic of a person, or the history of such characteristic, or the perception of such characteristic by the person complained against that is unrelated to the person's ability to perform the duties of a particular job or position. This handicapping condition must not be transitory or insubstantial and it must be significantly debilitating.

The Department has determined, that AIDS does fall within the meaning of "physical handicap" under our Act and the Interpretive Rules.

The aforementioned Rules also state that unlawful "perceived handicap" discrimination occurs when the complaining party is erroneously viewed by the person complained against as one who is or has been affected by a handicapping condition, e.g., AIDS. Accordingly, the Department has determined, that when the person

complained against discriminates against a charging party because he perceives that party to have AIDS, that action may be the basis for a "perceived handicap" (AIDS) charge.

The Act prohibits discrimination in five general areas: employment, housing, financial credit, public accommodations and sexual harassment in higher education. The public accommodations section prohibits discrimination in public accommodations and by public officials, who are defined in part as any officers or employees of the state, or any agency thereof.

The Department is accepting charges at the present time which allege either actual AIDS discrimination or perceived AIDS discrimination. The Department investigates these charges as it would any other charge of discrimination.

I hope we have answered all your questions. If you have any additional inquiries, do not hesitate to contact me.

Sincerely,

Shelvin L. Hall
General Counsel

SLH/riw

cc: Joyce E. Tucker, Director

JEFFREY L. AMESTOY
ATTORNEY GENERAL
BRIAN L. BURGESS
DEPUTY ATTORNEY GENERAL
WILLIAM E. GRIFFIN
CHIEF ASST. ATTORNEY GENERAL

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER
05602
TEL.: 802-828-3171

VERMONT

7-17-86

July 14, 1986

Benjamin Schatz, Esq.
Director, AIDS Civil Rights Project
National Gay Rights Advocates
540 Castro Street
San Francisco, CA 94114

Dear Mr. Schatz:

Our Civil Rights Section of the Public Protection Division would give due consideration to anyone claiming handicap discrimination under Vermont's Fair Employment Practices Act on the basis of AIDS. However, we have not received such a complaint to date.

I hope that this information will be sufficient for your purposes.

Very truly yours,

Denise R. Johnson
Chief, Public Protection Division

STATE OF KANSAS

COMMISSION ON CIVIL RIGHTS
214 SOUTHWEST SIXTH AVENUE—1ST FLOOR
LIBERTY BUILDING
TOPEKA, KANSAS 66603-3780
PHONE (913) 296-3206

June 9, 1986

JOANNE L. BURST
Executive Director
Assistant Director

Benjamin Schatz, Esquire
Director, AIDS Civil Rights Project
National Gay Rights Advocates
540 Castro Street
San Francisco, California 94114

Dear Mr. Schatz:

Your letter of May 30, 1986, has been passed to me for response.

Kansas Statutes Annotated 44-1002 contains the following definition of physical handicap:

> ". . . the physical condition of a person, whether congenital or acquired by accident, injury or disease which constitutes a substantial disability, but is unrelated to such person's ability to engage in a particular job or occupation."

To date our Court of Appeals and Supreme Court have ruled on only two (2) physical handicap cases. In essence these decisions held that there must be a current physical impairment which substantially restricts one or more major life functions in order that a complaining party qualify as "physically handicapped."

In these cases (U.S.D. No. 259 v. Palmer, 7 Kan. As 2nd 319 and Padilla v. City of Topeka, 238 Kan. 218) the appellate courts have held, seemingly incongruously, that the subject condition must currently render the complainant actually unable to perform a life function in a satisfactory manner in order to qualify as a "substantial disability," but that independent medical advice that a currently non-disabling condition may potentially become disabling on the job constitutes job-relatedness. Thus in the first case a job applicant for a custodial position who reported on a pre-employment physical that during a much earlier

physical blood had been detected in his urine was denied employment on that basis alone on the advice of the examining physician. In the second case an applicant for a law-enforcement position had uncorrected vision which was below the agency's minimum standard, but which was corrected to 20/20. The applicant testified that he had satisfactorily been employed as a peace-officer for some time, and had encountered no problems with his vision. In both cases the courts held; a) that the applicants had no substantial disability, and; b) that the condition was job-related.

Moreover, our legislature has clearly rejected proposed amendments to the definition which would include "perceived" disability or handicap within the coverage of the act.

As of this time we have received no complaints based on AIDS, nor, to my knowledge, have we been contacted by anyone wishing to file such a complaint. When such a complaint is presented I have no doubt that it will be accepted and processed just as any other complaint based on physical handicap. However, given the existing case law I cannot predict that the outcome will be favorable.

In answer to your final question, in Kansas discrimination on the basis of physical handicap is prohibited in the areas of employment and public accommodations, but not in housing.

Very truly yours,

Roger W. Lovett
Chief Legal Counsel

RWL/mks
cc: Joanne E. Hurst,
Executive Director

David F. Montoya
Executive Director

OFFICE:
930 BACA STREET, SUITE A
SANTA FE, NEW MEXICO 87501
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HUMAN RIGHTS COMMISSION
OF NEW MEXICO
TONEY ANAYA
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Carlsbad, NM

June 18, 1986

Benjamin Schatz, Esquire
Director, AIDS Civil Rights Project
National Gay Rights Advocates
540 Castro Street
San Francisco, California 94114

Dear Mr. Schatz:

In response to your letter of June 6th, it is our position that a person with AIDS or ARC would be protected under the handicap provisions of the New Mexico Human Rights Act. This protection would extend to the areas of employment, housing, credit and public accommodations.

Additionally, discrimination against a person because (s)he "has a record of such an impairment" or because (s)he "is regarded as having an impairment" (emphasis added) would also be unlawful.

I am enclosing copies of both our Act and Rules and Regulations which have been highlighted for your convenience.

I hope that this information meets your needs. If the Commission can be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

David F. Montoya
Executive Director

DFM:ps

Encl: As stated

Rules and Regulations

New Mexico Human Rights Commission

Phone 827-6420

Effective November 20, 1983

HUMAN RIGHTS COMMISSION

Rules and Regulations Governing and enacted by the Human Rights Commission effective October 20, 1983.

By virtue of the authority vested in the Human Rights Commission pursuant to the Human Rights Act, Section 28-1-4 NMSA 1978 Compilation, as amended, 1978 Compilation the New Mexico Human Rights Commission on October 20, 1983 adopted the following amended rules, which supersede and replace all previous rules and regulations for implementation of the Human Rights Act, superseding all previous rules and regulations.

In accordance with Section 28-1-5 New Mexico Statutes Annotated, 1978 Compilation, notice was given and public hearing was held on October 19, 1983, so that interested persons could present their views regarding these rules and regulations.

These rules and regulations will become effective thirty (30) days after filing.

I. DEFINITIONS

A. The following definitions shall apply as construing the Human Rights Act and rules and regulations adopted pursuant thereto:

1. "person" means one or more individuals, a partnership, association, organization, corporation, joint venture, legal representative, trustee, receiver or the state and all of its political subdivisions.

2. "employer" means any person employing four or more persons, and any person acting for an employer.

3. "commission" means the Human Rights Commission.

4. "employee" means any person in the employ of an employer for employment.

5. "applicant for employment" means a person applying for a position as an employee.

6. "labor organization" means an organization which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employment.

7. "employment agency" means any person regularly undertaking, with or without compensation, to procure opportunities to work or to procure, recruit or refer employees.

8. "public accommodation" means any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment which is by its nature and use distinctly private.

9. "housing accommodation" means any building or portion of a building which is constructed, which is used or intended to be used as the residence or sleeping place of any individual.

that an unlawful discriminatory practice occurred.

27. "affirmative action" means a program of self-imposed or directed action steps taken by employment, housing, public accommodation and credit agents designed to eliminate discriminatory or arbitrary barriers or the underutilization of protected groups. The action is established solely upon discretion to promote full participation for all persons otherwise qualified for jobs, housing, public accommodation and credit.

II. FILING A COMPLAINT

A. Persons who may file a complaint.

1. Any person claiming to be aggrieved by an unlawful discriminatory practice may by himself or herself, or through his or her legally authorized representative, make and sign a complaint and file said complaint with the Commission. An amendment may be filed any time thereafter.

2. Any Commissioner who has reason to believe that an unlawful discriminatory practice has occurred may make, sign and file a written complaint with the Commission. The complaint must state the facts which gave the Commissioner reason to believe that an unlawful discriminatory practice has occurred.

B. Forms.

1. The complaint of any person claiming to be aggrieved or the complaint of a Commissioner who has reason to believe an unlawful discriminatory practice has occurred shall be in writing and in a form acceptable to the Commission. The complainant may be assisted by the Commission in preparing his or her complaint.

2. A relief request form shall be made part of the investigative file.

C. Contents of the Written Complaint. Each complaint shall contain:

1. The name and address of the complainant.

2. The name and address of the respondent.

3. The date, place and description of the alleged unlawful discriminatory practice.

4. The basis on which the complaint is being filed.

5. The signature of the complainant.

D. Manner of Filing the Complaint.

1. The complaint must be delivered to the Commission either by personal delivery or by mail.

2. The complaint shall be deemed filed as of the date it is received at the Commission office, however, for the purpose of complying with the one hundred eighty (180) day requirement of Section 28-1-10(A), New

Mexico Statutes Annotated, 1978 Compilation, complaints which are filed first with any duly authorized civil rights agencies holding a work-sharing agreement with the Commission shall be deemed to have been filed with the Human Rights Commission as of the date filed with any of these agencies.

3. When the complaint is received at the Commission office the person accepting the complaint shall stamp and initial the complaint with the date it is received.

E. Amendments.

At any time during the course of an investigation up until the time of the determination, the complainant may file an amendment to his/her complaint so long as the amended complaint remains within the jurisdiction of the Commission.

F. Notice to Respondent.

Upon the filing of a complaint of amendment, the Commission shall within thirty (30) days furnish the respondent with a copy thereof by mail or in person.

G. Withdrawal or Closure of the Complaint.

1. The complainant may withdraw the complaint, amendment thereto or supplemental complaints at any time by signing a withdrawal form provided by the Commission, provided the Executive Director approves;

2. In the event that a complainant cannot be contacted for a thirty (30) day period at his or her last known address or forwarding address, or, in the event that a complainant refuses to cooperate with the Commission, the Executive Director shall administratively close the case, without prejudice;

3. In the event of a withdrawal or closure of a complaint, the Executive Director shall promptly notify the respondent of such action by mail.

H. Jurisdiction.

The Executive Director shall determine whether the Commission has jurisdiction to investigate a complaint at the time of filing. If at that time, or at any time during the investigation, it is determined that there is no jurisdiction, the complaint shall be dismissed and the complainant promptly notified by certified mail and respondent by regular mail.

III. INVESTIGATIONS AND CONCILIATION

A. As a part of the investigative process the Executive Director may require a fact-finding conference, and/or on-site investigation, with the parties prior to a determination on a complaint of discrimination. The conference is primarily an investigative forum intended to define the issues, to determine which elements are undisputed, to resolve those issues that can be resolved and to ascertain whether there is a basis for conciliation of the complaint.

10. "real property" means lands, leaseholds or commercial or industrial buildings, whether constructed or to be constructed, offered for sale or rent, and any land rented or leased for the use of parking, or storage of house trailers.

11. "unlawful discriminatory practices" means those unlawful practices and acts specified in Section 28-1-7, New Mexico Statutes Annotated, 1978 Compilation.

12. "commissioner" means one of the duly appointed members of the Human Rights Commission.

13. "executive director" means the coordinator and chief administrator responsible for carrying out the provisions of the Human Rights Act and the duly adopted rules and regulations of the Human Rights Commission.

14. "chairperson" means the duly appointed chairperson of the New Mexico Human Rights Commission or the Commissioner designated by the Commission to preside in the absence or incapacity of the duly appointed chairperson.

15. "respondent" means person, company, union, association, organization, agency, or any other enterprise named in a complaint as having allegedly engaged in an unlawful discriminatory practice.

16. "complainant" means any person who claims to be aggrieved by an unlawful discriminatory practice and who has filed a complaint with the Commission within one hundred eighty (180) days after the alleged unlawful discriminatory act was committed.

17. "certified mail" means with return receipt requested.

18. "**handicapped person**" means any person who has a physical or mental impairment which substantially limits one or more major life activities as defined in Section 28-1-2(L) New Mexico Statutes Annotated, 1978 Compilation, has a record of such an impairment, or is regarded as having such an impairment.

19. "**physical or mental impairment**" means, but is not limited to, any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs; respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary; hemic and lymphatic; skin; endocrine; any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

20. "**has a record of such an impairment**" means has a history of, or has been erroneously classified as having a mental or physical impairment that substantially limits one or more major life activities.

21. "**is regarded as having an impairment**" means having a physical or mental impairment that does not substantially limit major life activities but that is treated by a respondent as constituting such a limitation, has

a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairments, or has none of the impairments described above but is treated by a respondent as having such an impairment.

22. "a qualified handicapped person with respect to employment" means a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and shall not, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in employment under any program or activity.

23. "**a qualified handicapped person with respect to housing accommodation, credit and acquisition or maintenance of particular real property**" means a handicapped person whose handicap does not limit that person's ability to fulfill the obligations of occupancy, tenancy, ownership or credit responsibilities.

24. "reasonable accommodation" means, for employment purposes, such modifications or adaptations of the work environment or job responsibilities of a handicapped person as are necessary to enable him or her to perform the essential functions of the job in question and which do not impose an undue hardship on the employer.

25. "sexual discrimination" is defined to include, but not limited to, the following:

a. "sexual harassment" any unwanted and/or repeated physical or verbal action to pressure for sexual activity, including sexual advances, sexual contact, verbal or nonverbal sexual suggestions, sexual ridicule or sexual innuendos in order to:
   1. obtain, retain, or advance in employment as relates to matters of compensation or the terms and conditions of employment;
   2. obtain credit;
   3. obtain housing, continue housing agreements;
   4. be denied access or to limit public accommodations.

b. "pregnancy, childbirth, or related medical conditions". Women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs. Further, women affected by pregnancy, childbirth or related medical conditions shall be treated the same in the areas of credit, housing and public accommodations.

c. "marital status" rules restricting persons because of their marital status which do not apply equally to the opposite sex with the same status.

26. "determination" means the decision made by the Executive Director that a complaint lacks probable cause to believe that an unlawful discriminatory practice occurred or that probable cause exists to believe

VIII. HEARING

A. Commission Complaint

1. If, after a probable cause determination, efforts at conciliation have failed, or in the opinion of the Executive Director an informal conference cannot result in conciliation, the Commission shall issue a written complaint in its own name against the respondent. The Commission shall set forth the alleged discriminatory practice, the Commission's regulation or section of the Human Rights Act alleged to have been violated, and the relief requested.

2. The Commission complaint shall require the respondent to answer the allegations of the Commission complaint by appearing at a hearing before the Commission on the date, time and place specified in the Commission complaint or by filing written answer at the Commission office five (5) days prior to the scheduled hearing.

3. The Commission complaint shall be properly served on the respondent. Such complaint shall advise the respondent that failure to answer the Commission complaint, or appear at the hearing, may result in the entry of a judgment or order against him or her.

4. The hearing date shall not be more than fifteen (15) nor less than ten (10) days after service of the complaint. Such hearing shall be held in the county where respondent is doing business or where the alleged discriminatory practice occurred, at the discretion of the Commission.

B. Answer to Commission Complaint

1. The respondent shall either file a written answer to the Commission complaint or shall appear at the hearing before the Commission on the date specified and answer the allegations of the Commission complaint;

2. If a written answer is filed it shall contain an admission or denial of each and every allegation in the Commission complaint unless respondent states he or she has no knowledge or information sufficient to form a belief. Failure to answer any allegation shall be deemed an admission of that allegation.

C. Commission counsel may advise the Commission during the hearing and may assist in the preparation of the findings of fact, conclusions of law and order.

D. Sequence of the Hearing:

1. Introduction by the presiding Commissioner.

2. Introduction of the panel.

3. Administration of oath to the parties and witnesses by presiding Commissioner.

4. Consideration of any prehearing orders.

5. Opening statement by the complainant.

6. Opening statement by the respondent.

7. Presentation of complainant's case.

8. Presentation of respondent's case.

9. Closing argument by complainant.

10. Closing argument by respondent.

E. Appearance:

1. The complainant must be present at the hearing and may present testimony or evidence and may either in person or by counsel examine and cross-examine witnesses.

2. If, after receiving proper notice, the complainant does not appear at the hearing, the complaint may be dismissed.

F. Continuation and Adjournment:

The Commission or Commissioner may continue hearings from day to day or adjourn them to a later date or to a different place either by announcement at hearings or by appropriate notice to all parties.

G. Oral Arguments, Briefs and Findings:

1. The Commission shall permit the parties or their attorneys to present oral arguments at hearings and file briefs within ten (10) days after the adjournment of the hearing. The Commission shall allow the filing of reply briefs within five (5) days of submission of the briefs;

2. Each party shall submit proposed findings of fact and conclusions of law to the Commission within ten (10) days after the adjournment of the hearing.

H. Improper Conduct:

The Commission may exclude from the hearing room or from further participation in the proceedings any person who engages in improper conduct, excepting only a party or his attorney or a witness engaged in testifying.

I. Sequestering Witnesses:

The Commission may sequester witnesses from the hearing until the time of their testimony. A respondent will be allowed to have present throughout the hearing a representative, even though the representative may be called as a witness.

J. Burden of Proof:

The burden of proof is upon the complainant. The standard of proof shall be by a preponderance of evidence.

B. The Commission's authority to investigate a complaint is not limited to the procedure outlined in A. above.

C. The Executive Director may invite the parties to engage in conciliation discussions. Should conciliation be reached, the terms shall be reduced to writing in a conciliation agreement and will be signed by the parties and the Executive Director. If a conciliation agreement is signed, no determination need be issued by the Executive Director.

IV. DETERMINATION PROCEDURES

A. Before a determination is issued the Executive Director may order reinvestigation of any complaint.

B. After an investigation and summary of evidence are completed, the Executive Director will issue a determination unless a conciliation agreement has been signed.

C. The Executive Director shall serve the determination and the summary of evidence on both the complainant and respondent. If the determination is that no probable cause exists, the Executive Director will advise the complainant that the complaint is dismissed and of his/her right to appeal the determination in district court within thirty (30) days after receipt of the determination. If the determination is probable cause, and that discrimination took place, the Executive Director will attempt conciliation and, if that fails, cause to have issued a Commission complaint for hearing.

V. CONCILIATION AND PERSUASION

A. If the Executive Director finds probable cause for the allegations made in the complaint, he or she shall endeavor to eliminate such discriminatory practice by means of conciliation and persuasion with the respondent. If endeavors at conciliation succeed, a copy of the conciliation agreement shall be served upon the complainant either by personal delivery or certified mail at his or her last known address, together with a notice of his or her right to request a hearing before a Commissioner if the conciliation agreement does not conform to the relief requested.

B. Requests for Review of Conciliation Agreements:

1. Requests for review of conciliation agreements shall be in writing and shall be filed at the Commission office within ten (10) days from the date of receipt of the conciliation agreement, and shall state the grounds upon which the review is requested.

2. The complainant and respondent shall be given at least ten (10) days written notice of the time and place of the review of the conciliation agreements. The notice shall be given by personal delivery or by certified mail and shall advise the complainant and respondent of their right to attend the hearing and to present evidence, providing that the Executive Director cannot reach an amicable solution with all parties.

3. If, after having received proper notice, the complainant does not appear at the hearing, the case shall be considered closed, unless it is shown to the satisfaction of the hearing officer that the failure to appear was due to circumstances beyond the complainant's control.

VI. Section VI **(REVIEW HEARING BY COMMISSION)** is repealed.

VII. PREHEARING CONFERENCES AND ORDERS

A. A prehearing conference, conducted by the Executive Director or his assignee, shall be held prior to any hearing of a complaint by the Commission.

B. Representatives who will be participating in a hearing will attend the prehearing conference. Unless otherwise directed by the Executive Director or assignee, the representatives for the complainant will draft a proposed prehearing order in keeping with the action taken at the conference. The order will be substantially in accordance with the approved form of prehearing orders. Copies of a prehearing check list and approved form of the prehearing order are available at the office of the New Mexico Human Rights Commission.

C. The proposed prehearing order drafted by the complainant's representative shall be submitted to the respondent's representative for approving signature and, if approved, submitted to the Executive Director, or assignee, within ten (10) days from the date of the prehearing conference or at such time as the Executive Director, or assignee, shall order.

D. All representatives have reciprocal duties to cooperate in submitting promptly a proper prehearing order for the approval of the Executive Director, or assignee, in accordance with the above procedure.

E. The prehearing order entered by the Executive Director or assignee, shall control the issues of the subsequent hearing. The prehearing order shall not be amended except by consent of the parties and the Executive Director or assignee, or by order of the Executive Director or assignee, to prevent manifest injustice.

F. Representatives shall mark all exhibits before hearing. Exhibits for the complainant shall be marked numerically. Those for respondents shall be marked alphabetically. The identification number or letter shall remain the same whether the exhibit is accepted or rejected. Separate documents, photographs, papers and other written or printed instruments shall be given an individual exhibit number. An exhibit consisting of more than one (1) page shall be fastened and each page shall be numbered. Five (5) days prior to the start of a hearing, representatives shall file with the Commission five (5) copies of the list of exhibits intended to be offered at the hearing.

G. Evidence introduced as exhibits will be retained by the Commission until the appeal period has expired or final disposition if the matter is appealed.

H. Five (5) days prior to the start of the hearing, representatives shall file with the Commission five (5) copies of the list of witnesses intended to be called at the hearing.

D. UTILIZATION ANALYSIS

The employer must identify those areas within the employer's work force in which protected groups are being underutilized. A utilization analysis is composed of four different parts: a work force analysis, identification of job groups within the facility, an availability analysis, and an underutilization analysis. Each employer must show utilization for each facility according to geographic location within the context of local work availability.*

E. ESTABLISHMENT OF GOALS AND TIMETABLES

For each job group in which underutilization of protected groups is found, the employer must set up a system of goals and timetables for correcting the deficiencies.*

F. IDENTIFICATION OF PROBLEM AREAS AND EMPLOYMENT PRACTICES THAT HAVE AN ADVERSE EFFECT ON PROTECTED GROUPS

The employer must identify key job titles in which protected groups are underrepresented in relation to their known availability in the work force and those employment practices which have an adverse effect on protected groups so as to discourage their employment or full utilization. Employers must study flow, recruitment procedures, selection and placement procedures, promotions and transfers, seniority systems and terminations.*

G. ESTABLISHMENT OF SYSTEM FOR MONITORING COMPLIANCE

The employer is obligated to set up a system of monitoring to determine if the Affirmative Action Program is working and, if not, why not. The Commission may require periodic reviews of the agency and/or employer's Affirmative Action Program.

H. ESTABLISHMENT OF SYSTEM OF RECORD KEEPING IN PREPARATION FOR COMPLIANCE REVIEW

At any time during the initial stages of review or at any time in subsequent stages, the employer will be asked to supply the Human Rights Commission staff with certain records such as applicant flow data, hiring records, testing results, wage and job information, upward mobility action records, and records of termination and demotion. The employer must devise a system by which this information can be compiled for use as needed.

I. GRIEVANCE

The grievance procedure is an internal process whereby employees may file complaints, including allegations of discrimination, to an impartial party or parties without fear of reprisal. Findings and recommendations shall be submitted to the highest administrative officer of the employer for review and appropriate action.

J. STATEMENT ON UTILIZATION OF HANDICAPPED

The employer shall demonstrate a positive attitude in relation to the hiring, training, and promotion of the handicapped. It shall declare a policy of support for removing all barriers to employment of the handicapped. The employer will, through a voluntary process of employee self-identification, identify its handicapped population.

*It is understood that the limitation of data would affect the capacity of an agency to determine specific work force availability with precision.

IX. SUBPOENAS AND SUBPOENAS DUCES TECUM

A. The Commission, through its Executive Director, may issue subpoenas and subpoenas duces tecum in its own name. The Commission may also issue subpoenas and subpoenas duces tecum upon application of a party to the complaint, but service of the subpoenas and subpoenas duces tecum will be made by the requesting party in the same manner as prescribed by law for civil actions in the district courts of this State.

B. The cost of service, and witness and mileage fees for all hearings shall be borne by the party at whose instance subpoenas and subpoenas duces tecum are issued and the fees paid therefore shall be the same as those paid by the district courts of the State of New Mexico.

X. FINAL ORDER

Within thirty (30) days after the final adjournment of a hearing, the Commission shall issue its findings of fact and order. Within five (5) days thereafter, the Commission shall cause to be sent by certified mail to the address of record of each party of record and his or her attorney, if any, a written copy of the order.

XI. TRANSCRIPTS

A. Upon receipt of the notice of appeal, the Commission will file as much of the transcript of the record as requested.

B. All costs of transcribing a hearing pursuant to Section 28-1-13(B) New Mexico Statutes Annotated, 1978 Compilation, will be paid by the party requesting the transcript. However, nothing in these rules and regulations will be deemed as prohibiting an agreement between a complainant and respondent concerning the cost of the transcript.

XII. CONFIDENTIALITY

The Commission complaint, Commission decisions and Commission orders will be considered public records. Any other information contained within a Commission investigation file will not be considered public records, except as determined by law. This provision will not be applicable to a request for information by the complainant, respondent, or their respective attorneys. Nor does this provision apply to disclosure to representatives of any duly authorized civil rights agencies holding a worksharing agreement with the Commission.

XIII. PROCEDURES FOR FILING AN AFFIRMATIVE ACTION PLAN WITH THE HUMAN RIGHTS COMMISSION

All New Mexico state departments, agencies and universities shall file an updated Affirmative Action Plan with the Commission in accordance with the prevailing Executive Order.

XIV. AFFIRMATIVE ACTION PLAN CONTENTS

The following items represent standard Affirmative Action compliance in employment:

A. EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT

The employer must indicate a positive attitude toward equal employment opportunity and indicate that decisions regarding recruitment, hiring, training and promotions will be made without regard to race, color, religion, national origin, physical or mental handicap, age, sex, and ancestry, except when one of these criteria is a bona fide qualification for the occupation involved. It will also be regarded as a violation of equal employment opportunity values to use hiring criteria which set up barriers to employment or promotion for qualified persons without a strict foundation in occupational necessity.

The employer shall take all reasonable steps to insure the elimination of conduct that results in the harassment of any employee because of race, color, religion, national origin, physical or mental handicap, age, sex or ancestry.

The employer's full commitment to the principles of equal employment opportunity should be contained in the policy statement as well as an elaboration of all essential procedures related to the equal opportunity policy.

The employer's Civil Rights or Equal Opportunity Specialists and immediate staff should be named in the policy statement.

The statement must also pledge that all conversations and materials submitted by an employee in the informal grievance process, as well as that employee's identity, shall remain confidential and will not be disclosed to management except by the permission of the complaining party.

The highest ranking official shall sign the policy statement and date it appropriately.

B. ASSIGNMENT OF RESPONSIBILITY

The employer must select qualified staff persons of the facility to be appointed Civil Rights or Equal Opportunity Specialist of the employer's Affirmative Action Program. It will be the Civil Rights/Equal Opportunity Specialist's responsibility, among other things, to assist in the identification and solution of problems. The employer must give the Civil Rights/Equal Opportunity Specialist the necessary top management support and staffing to fulfill his or her job duties.

C. ESTABLISHMENT OF PROCEDURE FOR DISSEMINATING POLICY

A policy of Affirmative Action is considered to be of little value unless it goes beyond the words on a piece of paper and is put into effect. The Civil Rights/Equal Opportunity Specialist is responsible for establishing procedures for disseminating the agency's Affirmative Action Program both within the facility (internally) and outside the facility (externally).

CHAPTER 28*
Human Rights

Art.
1. Human Rights, 28-1-1 to 28-14.

ARTICLE 1
Human Rights

Section
28-1-1 Short title
28-1-2 Definitions
28-1-3 Commission on human rights
28-1-4 Powers and duties
28-1-5 Procedures for adopting regulations
28-1-6 Validity of regulation, judicial review
28-1-7 Unlawful discriminatory practice
28-1-8 This section has been repealed
28-1-9 Exemptions
28-1-10 Grievance procedure
28-1-11 Hearing procedures
28-1-12 Enforcement
28-1-13 Appeal
28-1-14 Posting of law and information

28-1-1. Short title.

This act [28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978] may be cited as the "Human Rights Act."

28-1-2. Definitions. — As used in the Human Rights Act:

A. "person" means one or more individuals, a partnership, association, organization, corporation, joint venture, legal representative, trustees, receivers or the state and all of its political subdivisions;

B. "employer" means any person employing four or more persons and any person acting for an employer;

C. "commission" means the human rights commission;

D. "employee" means any person in the employ of an employer or an applicant for employment;

*Chapter 28, Article 1 is reprinted from New Mexico Statutes Annotated 1978, with the exception of the history and annotations following each section. Because of the lengthiness of this annotated material, it has been omitted from this document to save space and cut costs.

STATE OF NEW MEXICO
HUMAN RIGHTS ACT

New Mexico
HUMAN RIGHTS COMMISSION
930 Baca Street
Santa Fe, New Mexico 87501
Telephone: (505) 827-6420

Amended April 6, 1983
Laws of 1983 Chapter 241

E. "labor organization" means any organization which exists for the purpose in whole or in part of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employment;

F. "employment agency" means any person regularly undertaking with or without compensation to procure opportunities to work or to procure, recruit or refer employees;

G. "public accommodation" means any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment which is by its nature and use distinctly private;

H. "housing accommodation" means any building or portion of a building which is constructed or to be constructed, which is used or intended for use as the residence or sleeping place of any individual;

I. "real property" means lands, leaseholds or commercial or industrial buildings, whether constructed or to be constructed, offered for sale or rent, and any land rented or leased for the use, parking or storage of house trailers;

J. "unlawful discriminatory practices" means those unlawful practices and acts specified in Section 28-1-7 NMSA 1978;

K. "physical or mental handicap" means a physical or mental impairment that substantially limits one or more of an individual's major life activities. An individual is also considered to be physically or mentally handicapped if he has a record of a physical or mental handicap or is regarded as having a physical or mental handicap; and

L. "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;

M. "applicant for employment" means a person applying for a position as an employee.

28-1-3. Commission on human rights.

A. There is created the "human rights commission" consisting of seven members appointed by the governor with the advice and consent of the senate. Not more than four of the members shall be of the same political party. Not more than one member may be appointed from any one county. The governor shall designate a member to serve as chairman. The commission shall designate one of its members as vice-chairman to preside in the absence or incapacity of the chairman.

B. The term of office of each member of the commission is for four years; however, of the commissioners first appointed, one shall be appointed for a term ending December 31, 1969, one for a term ending December 31, 1970, one for a term ending December 31, 1971 and two for terms ending December 31, 1972, provided, the two additional members added pursuant to this 1975 amendment shall be initially appointed for staggered terms of two and three years respectively so that one term ends on December 31, 1977 and one ends on December 31, 1978.

C. Any member chosen to fill a vacancy occurring otherwise than by expiration of term, shall be appointed for the unexpired term of the member whom he is to succeed. Four members of the commission constitute a quorum to conduct business. Vacancies on the commission shall not impair the right of the remaining members to exercise the powers of the commission.

D. Each member of the commission shall be reimbursed, as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-7 NMSA 1978], during the performance of official duties and shall receive no other compensation, perquisite or allowance.

E. The commission shall employ a full time executive director and such staff as necessary to carry out the provisions of the Human Rights Act [28-1-1 to 28-1-7, 28-1-9 to

28-1-14 NMSA 1978]. The appointment and compensation of legal counsel not on the commission staff shall be approved by the attorney general.

28-1-4. Powers and duties.

The commission may:

A. adopt, promulgate, amend and repeal rules and regulations to eliminate discrimination in employment, public accommodations or the acquisition of housing accommodations and real property;

B. receive, investigate and issue orders, including cease and desist orders, concerning complaints alleging an unlawful discriminatory practice;

C. seek to eliminate discrimination through conciliation and persuasion by voluntary conferences with interested parties;

D. apply to a district court in the county where the violating party resides for specific performance of any conciliation agreement or for enforcement of any order issued by the commission;

E. hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, order depositions and require the production for examination of any books, records, correspondence, documents and other evidence relating to any matter under investigation or in question before the commission. Contumacy or refusal to obey a subpoena issued pursuant to this section shall constitute contempt punishable by the district court of the judicial district in which the witness may be found. No individual shall be excused from attending and testifying or from producing evidence in obedience to a subpoena issued pursuant to this section on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or a forfeiture. However, no individual shall be prosecuted or subjected to any penalty or forfeiture concerning any matter for which he is compelled to testify or give evidence after having claimed his right against self-incrimination. Nevertheless, the individual so testifying shall not be exempt from prosecution and punishment for perjury committed while testifying;

F. endeavor to eliminate prejudice and to further good will. The commission in cooperation with the state department and local boards of education shall encourage an educational program for all residents of the state, calculated to eliminate prejudice, its harmful effects and its incompatibility with principles of fair play, equality and justice;

G. encourage voluntary advisory groups to study problems of discrimination in all fields, to foster through community efforts, good will and cooperation in this state, and to make recommendations to the commission for the development of policies and procedures which the commission may recommend to appropriate state agencies;

H. seek and enlist the cooperation and contributions and grants of individuals and foundations, private, charitable, religious, labor, civic and benevolent organizations, and the federal government for the purposes of this section;

I. issue publications and release the results of investigation and research which in the commission's judgment will tend to promote good will and prevent or eliminate discrimination; and

J. submit annually a written report of all its activities and recommendations to the governor and the legislature.

28-1-5. Procedures for adopting regulations.

A. No rule or regulation of general application may be adopted, amended or repealed without a public hearing before the commission.

B. The public hearing shall be in Santa Fe, and notice of the subject, time and place of the meeting, the manner in which interested persons may present their views and the method by which copies of the proposed rule, regulation or amendment may be obtained shall be:

(1) published in each county at least thirty days prior to the hearing date in a newspaper of general circulation; and

(2) mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of the hearing.

C. The commission shall allow all interested persons a reasonable opportunity to submit arguments and to examine witnesses testifying at the hearing.

D. The commission may designate a hearing officer to take evidence at the hearing.

E. Any person appearing or represented at the hearing shall be given written notice of the commission's action on the proposed rule, regulation, amendment or repeal.

F. No rule, regulation, amendment or repeal shall become effective until thirty days after its filing.

28-1-6. Validity of regulation; judicial review.

A. Any person who is or may be affected by a regulation adopted by the commission may appeal to the court of appeals for further relief. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days after filing of the regulation.

B. The procedure for perfecting an appeal to the court of appeals under this section consists of the timely filing of a notice of appeal with a copy attached of the regulation from which the appeal is taken. The appellant shall certify in his notice of appeal that arrangements have been made with the commission for preparation of a sufficient number of transcripts of the record of the hearing on which the appeal depends to support his appeal to the court, at the expense of the appellant, including three copies which he shall furnish to the commission.

C. Upon appeal, the court of appeals shall set aside the regulation only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by a preponderance of evidence in the record; or

(3) otherwise not in accordance with law.

28-1-7. Unlawful discriminatory practice.—It is an unlawful discriminatory practice for:

A. an employer, unless based on a bona fide occupational qualification, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex or physical or mental handicap; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age;

B. a labor organization to exclude an individual or to expel or otherwise discriminate against any of its members or against any employer or employee because of race, religion, color, national origin, ancestry, sex or physical or mental handicap;

C. any employer, labor organization or joint apprenticeship committee to refuse to admit or employ any individual in any program established to provide an apprenticeship or other training or retraining because of race, religion, color, national origin, ancestry, sex or physical or mental handicap;

D. any person, employer, employment agency or labor organization to print or circulate or cause to be printed or circulated any statement, advertisement or publication, to use any form of application for employment or membership or to make any inquiry regarding prospective membership or employment which expresses, directly or indirectly, any limitation, specification or discrimination as to race, color, religion, national origin, ancestry, sex or physical or mental handicap unless based on a bona fide occupational qualification;

E. an employment agency to refuse to list and properly classify for employment or refer an individual for employment in a known available job, for which the individual is otherwise qualified, because of race, religion, color, national origin, ancestry, sex or physical or mental handicap unless based on a bona fide occupational qualification, or to comply with a request from an employer for referral of applicants for employment if the request indicates either directly or indirectly that the employer discriminates in employment on the basis of race, religion, color, national origin, ancestry, sex or physical or mental handicap unless based on a bona fide occupational qualification;

F. any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any individual because of race, religion, color, national origin, ancestry, sex or physical or mental handicap, provided that the physical or mental handicap is unrelated to an individual's ability to acquire or rent and maintain particular real property or housing accommodation;

G. any person to:

(1) refuse to sell, rent, assign, lease or sublease or offer for sale, rental, lease, assignment or sublease any housing accommodation or real property to any individual or to refuse to negotiate for the sale, rental, lease, assignment or sublease of any housing accommodation or real property to any individual because of race, religion, color, national origin, ancestry, sex or physical or mental handicap, provided that the physical or mental handicap is unrelated to an individual's ability to acquire or rent and maintain particular real property or housing accommodation;

(2) discriminate against any individual in the terms, conditions or privileges of the sale, rental, assignment, lease or sublease of any housing accommodation or real property or in the provision of facilities or services in connection therewith because of the race, religion, color, national origin, ancestry, sex or physical or mental handicap, provided that the physical or mental handicap is unrelated to an individual's ability to acquire or rent and maintain particular real property or housing accommodation; or

(3) print, circulate, display or mail or cause to be printed, circulated, displayed or mailed any statement, advertisement, publication or sign or use any form of application for the purchase, rental, lease, assignment or sublease of any housing accommodation or real property, or to make any record or inquiry regarding the prospective purchase, rental, lease, assignment or sublease of any housing accommodation or real property, which expresses any preference, limitation or discrimination as to race, religion, color, national origin, ancestry, sex or physical or mental handicap, provided that the physical or mental handicap is unrelated to an individual's ability to acquire or rent and maintain particular real property or housing accommodation;

H. any person to whom application is made either for financial assistance for the acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation or real property or for any type of consumer credit including financial assistance for the acquisition of any consumer good, as defined by Section 55-9-109 NMSA 1978, to:

(1) consider the race, religion, color, national origin, ancestry, sex or physical or mental handicap of any individual in the granting, withholding, extending, modifying or renewing or in the fixing of the rates, terms, conditions or provisions of any financial assistance or in the extension of services in connection with the request for financial assistance; or

(2) use any form of application for financial assistance or to make any record or inquiry in connection with applications for financial assistance which expresses, directly or indirectly, any limitation, specification or discrimination as to race, religion, color, national origin, ancestry, sex or physical or mental handicap;

I. any person or employer to:

(1) aid, abet, incite, compel or coerce the doing of any unlawful discriminatory practice or to attempt to do so;

D. The commission shall not be bound by the formal rules of evidence governing courts of law or equity but shall permit reasonable direct examination and cross-examination and the submission of briefs. Testimony at the hearing shall be taken under oath and recorded by tape or otherwise. Upon the request of any party, testimony shall be transcribed, provided that all costs of transcribing shall be paid by the party so requesting. Each commissioner may administer oaths.

E. If the commission finds from the evidence that the respondent has engaged in a discriminatory practice, it shall make written findings of fact, conclusions of law and its decision based upon the findings of fact and conclusions of law. Within five days after any order is rendered by the commission following a hearing, the commission shall serve upon each party of record and his attorney, if any, a written copy of the order by certified mail to the party's address of record. All parties shall be deemed to have been served on the tenth day following the mailing. As part of its order, the commission may require the respondent to pay actual damages to the complainant and to pay reasonable attorney's fees, if the complainant was represented by private counsel, and to take such affirmative action as the commission considers necessary, including a requirement for reports of the manner of compliance.

F. If the commission finds from the evidence that the respondent has not engaged in a discriminatory practice, it shall make written findings of fact and serve the complainant and respondent with a copy of the findings of fact and with an order dismissing the complaint.

28-1-12. Enforcement.

If a respondent is not complying with an order of the commission, the attorney general or district attorney at the request of the commission, shall secure enforcement of the commission's order by a district court. Such proceeding shall be initiated by the filing of a petition in the district court where the respondent is doing business or the alleged discriminatory practice occurred. A copy of the petition shall be served on the respondent personally or by registered mail, return receipt requested. The court may make and enter upon the proceedings an order to decree enforcement of the order of the commission.

28-1-13. Appeal.

A. Any person aggrieved by an order of the commission may obtain a trial de novo in the district court of the county where the discriminatory practice occurred or where the respondent does business by filing a notice of appeal within thirty days from the day of service of the commission's order. A copy of the notice of appeal shall be served personally or by certified mail, return receipt requested, at their last known address on all parties who appeared before the commission and shall also be served at the commission office in Santa Fe. No order of the commission shall be superseded or stayed during the appeal unless the district court so directs after notice to the commission and a hearing.

B. If testimony at the hearing was transcribed, the commission shall, upon receipt of the notice of appeal, file so much of the transcript of the record as the parties requesting the transcript designate as necessary for the appeal with the district court.

C. Upon appeal, either party may request a jury. The jurisdiction of the district court is exclusive and its judgment is final, subject to further appeal to the supreme court.

D. In any action or proceeding under this section if the complainant prevails, the court in its discretion may allow actual damages and reasonable attorney's fees, and the state shall be liable the same as a private person.

28-1-14. Posting of law and information.

Every person, except an individual selling houses, shall keep posted in a conspicuous place on his premises notices prepared by the commission, which shall set forth excerpts of the Human Rights Act [28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978] and other relevant information as determined by the commission.

(2) engage in any form of threats, reprisal or discrimination against any person who has opposed any unlawful discriminatory practice or has filed a complaint, testified or participated in any proceeding under the Human Rights Act, or

(3) willfully obstruct or prevent any person from complying with the provisions of the Human Rights Act or to resist, prevent, impede or interfere with the commission or any of its members, staff or representatives in the performance of their duties under the Human Rights Act, or

J. any employer to refuse or fail to accommodate to an individual's physical or mental handicap unless such accommodation is unreasonable or an undue hardship.

28-1-8. Certification of pre-existing disability.

Section 28-1-8 NMSL 1978 (being Laws 1973, Chapter 155, Section 3) is repealed.

28-19. Exemptions.

Nothing contained in the Human Rights Act [28-1-1 to 28-1-7, 28-19 to 28-1-14 NMSA 1978] shall:

A. apply to any single family dwelling sold, leased, subleased or rented by owner without the making of any notice, statement or advertisement with respect to the sale, lease, sublease or rental of a dwelling unit that indicates any preference, limitation or discrimination based on race, color, religion, national origin, ancestry or sex. This exemption is subject to these further reservations:

(1) to qualify for the exemption, the seller must not be an owner of or own or have reserved any interest in more than three single-family dwellings, and

(2) if the seller doesn't presently live in the dwelling or he was not the most recent occupant, then the exemption granted in this section will only apply to one sale in twenty-four months;

B. bar any religious or denominational institution or organization which is operated or supervised or controlled by, or is operated in connection with a religious or denominational organization from limiting admission to or giving preference to persons of the same religion or denomination, or from making selections of buyers, lessees or tenants as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established or maintained unless membership in the religious or denominational organization is restricted on account of race, color, national origin or ancestry;

C. apply to rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of the living quarters as his residence;

D. apply to public rest rooms, public showers, public dressing facilities or sleeping quarters in public institutions, where the preference or limitation is based on sex; and

E. prevent the mandatory retirement of an employee upon reaching the age of sixty-five years or older, if the employer is operating under a retirement plan which meets the requirements of Public Law 93-406, the Employee Retirement Income Security Act of 1974.

28-1-10. Grievance procedure.

A. Any person claiming to be aggrieved by an unlawful discriminatory practice, and any member of the commission who has reason to believe that discrimination has occurred, may file with the commission a written complaint which shall state the name and address of the person alleged to have engaged in the discriminatory practice, all information relating to the discriminatory practice and any other information that may be required by the commission. All complaints must be filed with the commission within one hundred eighty days after the alleged act was committed.

B. The executive director of the commission shall advise the respondent that a complaint has been filed against him and shall furnish him with a copy of the complaint. The executive director and the commission staff shall promptly investigate the alleged act. If the executive director determines that the complaint lacks probable cause, he shall dismiss the complaint and notify the complainant and respondent of the dismissal. The complaint shall be dismissed subject to appeal as in the case of other orders of the commission.

C. If the executive director determines that probable cause exists for the complaint, he shall attempt to achieve a satisfactory adjustment of the complaint through persuasion and conciliation. The executive director and staff shall neither disclose what has transpired during the attempted conciliation nor divulge information obtained during any hearing before the commission or a commissioner prior to final action relating to the complaint. Any officer or employee of the commission who makes public in any manner whatever any information in violation of this subsection is guilty of a misdemeanor and upon conviction shall be fined not more than one thousand dollars ($1,000) or imprisoned not more than one year.

D. If conciliation fails or if, in the opinion of the executive director, informal conference cannot result in conciliation, the commission shall issue a written complaint in its own name against the respondent. The complaint shall set forth the alleged discriminatory practice, the commission's regulation or the section of the Human Rights Act alleged to have been violated and the relief requested. The complaint shall require the respondent to answer the allegations of the complaint at a hearing before the commission and shall specify the date, time and place of the hearing. The hearing date shall not be more than fifteen nor less than ten days after service of the complaint. The complaint shall be served on the respondent personally or by registered mail, return receipt requested. The hearing shall be held in the county where the respondent is doing business or the alleged discriminatory practice occurred.

E. Upon the commission's petition, the district court of the county where the respondent is doing business or the alleged discriminatory practice occurred may grant injunctive relief pending hearing by the commission or pending judicial review of an order of the commission so as to preserve the status quo or to ensure that the commission's order as issued will be effective. The commission shall not be required to post a bond.

28-1-11. Hearing Procedures.

A. The respondent to a complaint made pursuant to Section 28-1-10 NMSA 1978 may file a written answer to the complaint, appear at the hearing, give testimony and be represented by counsel and may obtain from the commission subpoenas for any person or for the production of any evidence pertinent to the proceeding. The complainant must be present at the hearing and may be represented by counsel. Each party shall have the right to amend his complaint or answer.

B. A panel of three members of the commission designated by the chairman shall sit, and a decision agreed upon by two members of the panel shall be the decision of the commission. However, no commissioner who has filed a complaint may sit on the panel hearing his complaint.

C. A member of the commission staff, the attorney general or special counsel shall present to the commission the case supporting the complaint. No evidence concerning prior attempts at conciliation shall be received. The executive director of the commission shall not participate in the hearing, except as a witness.

Nebraska

STATE OF NEBRASKA

EQUAL OPPORTUNITY COMMISSION

ROBERT KERREY
Governor

Lawrence R. Myers
Executive Director

Mr. Benjamin Schatz
National Gay Rights Advocates
54 Castro Street
San Francisco, CA 94114

June 3, 1986

Dear Mr. Schatz:

The Nebraska Equal Opportunity Commission is in receipt of your communication dated May 30, 1986 relative to the subject of AIDS and their relationship to disability discrimination under the Nebraska State Law.

The Nebraska Legislature has not mandated or past legislation indicating that AIDS is to be covered under the Nebraska Fair Employment Practice Act. The Nebraska Fair Employment Practice Act does prohibit discrimination because of ones disability. However, Section 48-1102(8) gives some examples of disability discrimination and in those areas that are not mentioned, the law states that a disability "shall also mean the physical or mental condition of a person which constitutes a substantial handicap as determined by a physician that is unrelated to such persons ability to engage in a particular occupation." Therefore, it is this writers conclusion that if an individual files a charge of alleged disability discrimination and as the basis state that AIDS is the disability, then he/she will have to supply the Commission with a statement from a physician stating that the person has a substantial handicap and then the Commission will do an investigation to see if it is unrelated to the persons ability to engage in a particular job or occupation.

To date the Commission has not had to face the problem of someone filing a complaint of alleged disability discrimination because he/she has AIDS. The Commission approaches each case on an individual basis and therefore this letter should only be construed as an opinion of this author and not that, necessarily of the State Government nor the entire Commission. I hope that this communication has answered your concerns. If I can be of further assistance, please feel free to contact the undersigned.

On behalf of the Commission,

L. R. Myers

Lawrence R. Myers
Executive Director

LRM/jme

REPLY TO

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Chairperson
JOSEPH X. YAFFE
Vice-Chairperson
DORIS M. LEADER
Secretary
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Executive Director
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COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION
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Harrisburg, Pennsylvania 17105-3145
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RAQUEL OTERO de YIENGST

Reply to:
P.O. Box 3145
Harrisburg, PA 17105-3145

July 15, 1986

Benjamin Schatz, Esquire
Director, AIDS Civil Rights Project
National Gay Rights Advocates
540 Castro Street
San Francisco, CA 94114

Dear Mr. Schatz:

This is in response to your letter of July 10, 1986.

The Pennsylvania Human Relations Act provides protection against discrimination because of non-job-related handicap or disability. The Pennsylvania Human Relations Commission treats AIDS and AIDS-related complaints as it would any other handicap or disability complaint. Job-relatedness must, of course, be determined on a case-by-case basis.

Enclosed for your information are our Commission's Regulations regarding handicap/disability discrimination and a copy of a memorandum, "AIDS Background Information and Policy dated April 10. 1986.

Our Commission has received several complaints involving AIDS. We have also conducted an orientation session on AIDS for all staff, to deal with issues of jurisdiction, investigative procedures, and the syndrome itself.

Should you need additional information, please feel free to contact me at the above address or at (717) 783-8263.

Very truly yours,

Louise Oncley

Louise Oncley, Special Assistant
to the Executive Director

LO:cf

Enclosure

THE STATE OF WYOMING

ED HERSCHLER
GOVERNOR

Department of Labor and Statistics

HERSCHLER BUILDING CHEYENNE, WYOMING 82002 (307) 777-7261

June 11, 1986

NGRA
540 Castro Street
San Francisco, CA 94114

Dear Mr. Schatz:

We are in receipt of your letter of May 30, 1986 concerning coverage of AIDS under the Wyoming Fair Employment Practices Act.

Enclosed is a copy of the handicap amendments to our State law and a copy of the rules adopted pursuant to the amendment. Based upon the law and the rules and regulations, this agency would give due consideration to anyone claiming handicap discrimination on the basis of having AIDS.

I hope this answers your inquiry. If you have any further questions, please contact me.

Sincerely,

Charles A. Rando, Supervisor
Labor Standards/Fair Employment

drp

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CHAPTER V

RULES OF PRACTICE AND PROCEDURE BEFORE
THE WYOMING FAIR EMPLOYMENT COMMISSION
CONCERNING HANDICAP DISCRIMINATION COMPLAINTS
FILED PURSUANT TO THE FAIR EMPLOYMENT
PRACTICES ACT OF 1965 AS AMENDED

Section 1. Authority. These rules of practice and procedure are promulgated as authorized by W.S. 27-9-101 to 27-9-108, and W.S. 16-3-101 to 16-3-115.

Section 2. Purpose. The purpose of these rules and regulations is to provide definitions and guidelines concerning handicap discrimination under the Wyoming Fair Employment Practices Act as amended by the Wyoming Legislature under Original House Bill No. 40 of the 1985 General Session.

Section 3. Definitions.

(a) "Handicapped person" means any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.

(b) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive, digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or any mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(c) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(d) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(e) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (b).

(f) "Qualified handicapped person" means, with respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question.

(g) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (a) of this section.

Section 4. Guidelines on Reasonable Accommodation. Reasonable accommodation. An employer shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Reasonable accommodation may include:

(a) Making facilities used by employees readily accessible to and usable by handicapped persons, and

(b) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(i) In determining whether an accommodation would impose an undue hardship on the operation of an employer's program, factors to be considered include:

(A) The overall size of the employer's program with respect to number of employees, number and type of facilities, and size of budget;

(B) The type of the employer's operation, including the composition and structure of the employer's workforce; and

(C) The nature and cost of the accommodation needed.

(ii) An employer may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

(iii) Occupational training and retraining programs, including but not limited to guidance programs, apprentice training programs, on-the-job training programs and executive training programs, shall not be conducted in such a manner as to discriminate against persons with physical or mental disabilities.

(ORIGINAL SIGNED BY
PRESIDENT AND SPEAKER)
SIGNED BY GOVERNOR
DATE: 2-8-85
CHAPTER NO: 5

ORIGINAL HOUSE
BILL NO. 0040

ENROLLED ACT NO. 2, HOUSE OF REPRESENTATIVES

FORTY-EIGHTH LEGISLATURE OF THE STATE OF WYOMING
1985 GENERAL SESSION

AN ACT to amend W.S. 27-9-105(a) and by creating a new subsection (d) relating to rights of handicapped persons; prohibiting discrimination in the employment of handicapped persons; providing a definition; and providing for an effective date.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 27-9-105(a) and by creating a new subsection (d) is amended to read:

27-9-105. Discriminatory and unfair employment practices enumerated; limitations.

(a) It is a discriminatory or unfair employment practice:

(i) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation or the terms, conditions or privileges of employment against, a qualified handicapped person or any person otherwise qualified, because of age, sex, race, creed, color, national origin or ancestry;

(ii) For a person, an employment agency, a labor organization, or the employees or members thereof, to discriminate in matters of employment or membership against any person, otherwise qualified, because of age, sex, race, creed, color, national origin or ancestry, or a qualified handicapped person;

(iii) For an employer to reduce the wage of any employee to comply with this chapter.

(d) As used in this section "qualified handicapped person" means a handicapped person who is capable of performing a particular job, or who would be capable of performing a particular job with reasonable accommodation to his handicap.

HANDICAP

ORIGINAL HOUSE
BILL NO. 0040

ENROLLED ACT NO. 2, HOUSE OF REPRESENTATIVES

FORTY-EIGHTH LEGISLATURE OF THE STATE OF WYOMING
1985 GENERAL SESSION

Section 2. This act is effective May 23, 1985.

(END)

Speaker of the House

President of the Senate

Governor

TIME APPROVED: _____

DATE APPROVED: _____

(ORIGINAL SIGNED BY
PRESIDENT AND SPEAKER)
SIGNED BY GOVERNOR
DATE: 2-8-85
CHAPTER NO: 5

OREGON

quate. Generally, these charges fall into two categories: (1) the relief being sought was authorized under state law but was not granted, and (2) the relief being sought was not authorized under state law. It is the Commission's position that a prior state court decision on the issue of relief is entitled to preclusive effect under *Kremer* where the decision would be accorded preclusive effect on that issue under the law of that state.

Where the relief being sought by a charging party was authorized under state law, state rules of res judicata may bar a subsequent action seeking different or additional relief because the issue of relief either was or could have been raised in the prior state court action.[10] Thus, where state law authorizes the particular form of relief being sought by a charging party, the Commission will look to that state's law to determine whether preclusion applies. If state law precludes a subsequent action on the issue of relief, the charge will be dismissed and a notice of right to sue issued. If state law does not preclude such an action, the Commission will continue to process the charge. However, where a charging party seeks only attorney fees, the Commission will limit its role to issuing a notice of right to sue.

Where state law does not authorize the particular form of relief being sought, a charging party may bring a subsequent federal action to recover such relief. *New York Gaslight Club, Inc. v. Carey* [23 EPD ¶30,955], 447 U.S. 54 (1980).[11] Such an action is not precluded under *Kremer*, since the issue of relief could not have been raised in state court because it was not authorized. Therefore, the Commission will continue to process charges where state law does not provide for the form of relief being sought. However, as stated above, where a charging party seeks only attorney fees, the Commission will limit its role to issuing a notice of right to sue.

Questions concerning the application of this policy statement to the facts of a particular charge should be directed to the Regional Attorney for the Commission office in which the charge was filed.

[¶ 5020] Employment Discrimination Based on AIDS Prohibited, Oregon Commissioner States

Oregon Bureau of Labor and Industries, Commissioner Mary Roberts' Opinion Letter to Attorney James M. Campbell, March 13, 1986.

Oregon—FEP Act and Civil Rights Division Rules

AIDS Discrimination—Mental or Physical Handicap—Rules and Regulations.—Oregon's Civil Rights Division has interpreted the statutory ban on job bias because of physical or mental handicap to include AIDS. As a result, it has not promulgated any general announcements regarding AIDS following its promulgation of regulations on physical or mental disabilities.

Back reference.—¶ 26,999.44.

This will acknowledge and thank you for the informative letter in caption.

Your view on the problems in employment associated with HTLV-III infections, generically referred to as "AIDS", closely mirrors the current policy of the Civil Rights Division of the Oregon Bureau of Labor and Industries. We have adopted the rationale, as early as mid-1985, that adverse employment decisions by an employer based on the mere suggestion of infection with the virus would allow the offended employe to file with us under ORS 659.425 [Discrimination against the physically or mentally handicapped]. This opinion is based on Oregon Administrative Rules 839-06-200 to 839-06-255 [on the physically and mentally handicapped] which outlines the Division's interpretation of the statute. It is also based on available medical opinion respecting the risk and manner of transmission and the degree of disablement involved.

* * * * *

The [previously mentioned] rules have been in effect since January, 1984; to date the Division has not promulgated any general announcement regarding AIDS. The Division has consistently answered inquiries from the employer community as well as from potential complainants to the effect that an adverse employment decision based on AIDS, ARC, or a sero-positive finding known to the employer would be a violation. Such a decision based on a perception that the individual employe or applicant is a member of a high risk group, and is therefore "treated by an employer .... as having an impairment" (ORS 659.400(3)(c)(C) defining ORS 659.425(1)(i) would also be a violation. We believe that no special rules regarding AIDS are necessary given the statute and existing rules. Thank you again for your interest.

---

[10] *Trujillo v. County of Santa Clara* [37 EPD ¶35,424], 766 F.2d 1368 (9th Cir. 1985) [opinion withdrawn and replaced, CA-9 1985, 39 EPD ¶35,871, 775 F2d 1359] (res judicata applies where the state court was authorized to award attorney fees but declined to do so). *Cf. Patzer v. Board of Regents* [37 EPD ¶35,314], 763 F.2d 851 (7th Cir. 1985) (a federal court action for supplemental relief in the form of back pay would be allowed under state law as an exception to state rules of res judicata, even where back pay was authorized but not awarded in state court).

[11] In *Carey*, the Supreme Court considered the role that the states play under Title VII and concluded that:

"It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief."
447 U.S. at 65.

[¶ 5021] Tree Farmers May Hire Illegal Aliens

Louisiana Attorney General's Opinion No. 85-599, August 8, 1985.

Louisiana—Employment of Aliens

Tree Farmers—Employment of Illegal Aliens—"Agriculture" Exemption.—Tree farmers engaged in planting trees which, when mature, would be used for logging purposes are exempt from the statutory prohibition against employing illegal aliens. The exemption from the prohibition for aliens employed in the production of *raw agricultural crops* or *horticultural products* includes the activity of raising trees.

Back reference.—¶ 23,549.

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Delaware

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DEPARTMENT OF COMMUNITY AFFAIRS
DIVISION OF HUMAN RELATIONS
820 N. FRENCH STREET
WILMINGTON, DELAWARE 19801
TELEPHONE (302) 571-3485

OFFICE OF THE
DIRECTOR

August 20, 1986

Ms. Carol Moore
MGRA
540 Castro Street
San Francisco, CA 94114

Dear Ms. Moore:

Relative to our phone conversation on the position of the Delaware Human Relations Commission regarding AIDS cases, I respectfully submit the following information.

The Delaware Equal Rights to Housing Law and the Public Accommodations Law prohibits discrimination based on race, age, marital status, creed, color, sex, handicap or national origin. The law further defines "handicap" as a physical or mental impairment which substantially limits one or more of such person's major life activities; a person must have a record of having such an impairment or be regarded as having such an impairment.

With the aforementioned definition in mind we sought legal guidance from the Delaware Attorney General's Office regarding AIDS as a handicap in dealing with the two laws above. We were informed that the specific facts of a certain condition would render whether a person would fall within the criteria set forth in the law, therefore that factual question should be best left to a case by case determination. That is, the determination of whether the impairment of life activities in fact, or as perceived meet the definition of handicap under our statute.

The Commission is guided by the legal opinion of the Attorney General's Office in the efforts of equal rights to housing and public accommodations.

The Commission has only one handicap case where AIDS condition may be used as a factor. This case is now scheduled for hearing next month.

I hope that this information will be of value to you.

Sincerely,

Andrew J. Turner, Jr., Director
Division of Human Relations

AJT/nlg

EMPLOYMENT AND INSURANCE ISSUES FOR THE CANCER PATIENT

ROBERT J. McKENNA, M.D.
Clinical Professor of Surgery
USC School of Medicine
Los Angeles, California

Will I be able to work after cancer? Will I be able to have or afford health and other insurance after cancer? These questions are faced by more than 400,000 Americans each year. For some, these questions may arise many times over the years.

To work is to survive, be independent and self-sufficient; to earn is a measure of personal adequacy and worth. A job usually means access to health care through group insurance benefits. Both employment and health insurance are of major importance to most individuals living after a diagnosis of cancer.

There are over 5 million Americans living today who have a history of cancer; 60 percent of them were diagnosed more than 5 years ago and the majority can now be considered cured. More than 850,000 Americans are added to this group each year.[1]

Who in the Work Force Gets Cancer?

The annual incidence of cancer in a study of over three-quarters of a million workers was 2.11 per thousand employees.[2] The cancer rate in the work force increases with age of the employees (see Table 1). The cancer rate for females is 2.57 and is greater than the cancer rate for males (1.67) until the seventh decade is reached (Table 1). In this study from the Bell Telephone System, 82 percent of the males who had cancer were over age forty and 77 percent of the females were over age forty. Cancer rates for the sixth decade were more than ten times the rate for the third decade.

Socioeconomic Impact of Cancer

As a consequence of cancer, many psychosocial issues impact on both employee and employer, as well as on the family and on society. A variety of social attitudes and individual misconceptions surface at the time of the cancer diagnosis and may resurface years after.

Although no scientific evidence exists that cancer is contagious, fear that it might be is sometimes a concern of fellow employees, employers and even of friends and neighbors.

Cancer is always a life-threatening illness, and some individuals expect a fatal outcome even though the prognosis may be excellent; consequently, some workers will never attempt to return to work. Some employees may elect to take prolonged sick leave, permanent disability, early retirement and a pension when eligible. The employer may also discourage a return to work, expecting that frequent absences will be needed for future treatment, for persistent or recurrent cancer, or for complications of prior treatment.

The well-meaning employer may be self-serving when concerned about future health costs for the employee with a past history of cancer as well as the cost of other fringe benefits. Employers are sometimes concerned that Workman's Compensation Insurance will cost more if a recovered cancer patient is injured on the job. Some employers are unwilling to train a less-than-perfect individual for new duties, preferring instead to leave a former cancer patient stuck in his original job. Some employers have concerns about productivity of the patient with cancer who is working, but such fears are unfounded. These and other attitudes and misconceptions compound the problems which many cancer victims face on entering or retaining their place in the work force. Educating both workers and employers should enlighten both about the hopeful side of cancer.

TABLE 1
CANCER INCIDENCE IN THE WORK FORCE

Age (Years)	*Age Specific rate for cancer per 1000 workers*[2] *Male*	*Female*
<20	0.3	0.3
20-29	0.5	0.7
30-39	0.7	1.8
40-49	1.9	4.1
50-59	4.9	7.1
60+	9.9	9.0

Present address: Wilshire Oncology Medical Group, 201 S. Alvarado St., Ste. A, Los Angeles CA, 90057.

From: PROCEEDINGS OF THE FOURTH NATIONAL CONFERENCE ON CANCER NURSING - 1983
New York, New York: American Cancer Society, Inc., 1984.

Returning to Work After Cancer

The average length of sick leave due to cancer was 93.3 days for men and 108.3 days for women.[2] Job absence due to cancer,[3] while usually prolonged, is infrequent (14th for men and 15th for women) when compared with other illnesses for job absence of seven or more days.

Insurance benefits for continuation of income have become more generous in recent years. The duration of this income protection varies from company to company depending on length of service. Not all patients return to work. Cancer is the leading cause of death for women in the Bell Telephone series[3] and the second leading cause of death for men.

Most employees return to their jobs after cancer treatment; 78.8% of women and 70.6% of men were able to resume employment.[2] The sex difference is explained largely by the higher death rate of men (23.4%) compared to women (13.7%) (Table 2). This positive outcome of cancer treatment (return to work) reflects the progress which has been made in cancer control through improved treatment, early diagnosis and even prevention; e.g., precancerous lesions such as are found in cervical carcinoma in situ are 100% curable.

It is very reassuring for an employee to know that a job is waiting when he or she is able to return to work. Most cancer patients are anxious to return but there are exceptions; some have fears for their future, and some fear rejection by fellow employees and their employer. Encouragement by the oncologist, and professional counseling prior to return to work, are far from routine but could be of help in coping with anticipated or actual attitudinal reactions in the workplace.

The location of the employee's cancer may determine ability to return to work, since it appears some cancer sites may be associated with no physical or psychological disabilities. Stone's report on the experience at the Bell Telephone Company showed a return to work for several cancer sites: genital tract-88%; breast-85%; gastrointestinal tract-68%; and lung-48%.[3]

All patients should be encouraged to work after cancer treatment. The patient with limited life expectancy as a result of the cancer should have the hope of returning either to full or part-time work if work-*able*. The cancer patient with disability deserves maximum rehabilitation and vocational retraining; examples would include the patient with a laryngectomy[4] or an amputation.[5]

TABLE 2
EMPLOYMENT AFTER CANCER TREATMENT[2]

	Male	*Female*
Return to work	70.6%	78.8%
Benefits exhausted		
Put on pension disability	6.0%	7.5%
Died before return to work	23.4%	13.7%

Greenleigh Study

Most studies about returning to work after cancer have been undertaken either in one industry or in one medical center concerning one cancer site. The California Division of the American Cancer Society commissioned a study[6] of 810 patients randomly selected throughout the state. Patients aged 20 to 70 were interviewed 6 to 24 months after their cancer diagnosis, a time delay which eliminated some of the more lethal cancer sites such as leukemia and lung cancer, where death frequently intervened before the interview.

The more a patient earned at the time of cancer diagnosis, the more likely the patient would be working after treatment. Only 3% of those earning more than $25,000/year were not working after cancer, in contrast to 7% of the $15,000-25,000 group, and 11% of the less than $7500 group (Table 3). Some low-income individuals have more physically demanding jobs and as a result, some might be expected to give up their job due to the effects of cancer.

Age proved to be another significant varia-

ble in employment after cancer. More job loss was noted in ages 46-64 (years) when compared with younger patients (Table 4).

Significant variations in productive employment following a diagnosis of cancer were observed for different cancer sites (Table 5). Patients with breast and uterine cancer were the least affected, while patients with leukemia and lung cancer were the most affected. Some employees were currently working part-time, some were retired and others were on disability. The net effect was a loss of job income for 1/7th of those with prostate cancer, 1/5th of those with uterine and breast cancer, 1/4th of those with colo-rectal cancer, 1/3rd of those with oral cancer and half of those with lung cancer, leukemia, and lymphoma.

Applicants for New Employment After Cancer

Some employers with little medical justification require an arbitrary interval between the date of cancer treatment and job application to be sure the cancer is cured. This interval might vary from two to ten or more years. Such personnel policies seem arbitrary with no relation to stage or extent of cancer and with no relation to the individual prognosis. All such concepts are both illegal and inhumane.

The Metropolitan Life Insurance Company[7] has been selectively employing workable cancer patients since 1957. Between 1957 and 1971, 74 applicants were hired with a cancer history, a rate of 0.63/1000 new employees. Approximately the same number of applications with a cancer history were not hired during the same period.

Turnover rate, absenteeism and work performance by the group were comparable to a matched company population. Only 2.7% developed a cancer recurrence. Dr. Wheatley, Medical Director of the Metropolitan Life Insurance Company, concluded that selective hiring of patients who have been treated for cancer, in positions for which they are qualified, is a sound industrial practice. He states that to wait until one might be sure a patient is cured of cancer before hiring will create hardships and does not reflect modern successful outcomes of cancer therapy. Delays are especially difficult for young persons who have not established a vocational career. He advises a change in the attitude of oncologists and occupational physicians toward the hiring process of the work-able cancer patient. He recommends that the oncologist candidly provide a job reference with a summary of cancer treatment, performance status and prognosis. It is unreasonable to demand that the cancer patient be "cured" before being eligible for employment.

Some employers still refuse to hire work-able cancer patients using a variety of excuses or subterfuges. Such practice was routine before 1957 and today violates Federal Laws such as Title VII of the Civil Rights Act of 1964, the "Rehabilitation Act of 1973 (Sections 503 and 504), and the Vietnam Era Veterans Readjustment Act of 1974. In addition, more than 35 states have Affirmative Action Fair Employment Acts to prevent employment discrimination of the cancer patient. Most legal definitions of job discrimination assume that the recovered cancer patient is disabled — and as a group, they require legal protection to insure equal opportunity in employment. Most recovered cancer patients do not have limitations of physical and mental capacity, as do many other disabled persons. The work-able cancer patient may be able to perform the job, but simply may be unable to gain access to the job.

Employment Discrimination

In 1969, two of my cured cancer patients were employed in the aerospace industry and were laid off due to a contract completion. They were offered new employment by other aerospace firms but were later rejected when their prior cancer history was revealed. This problem was reported to the California Division of the American Cancer Society and an Ad Hoc Committee was formed to review employment discrimination. In 1973, 44 case reports documented that employment problems did exist for cancer patients.[8] Three studies by Feldman[9-11] of employment problems of the White Collar Worker, the Blue Collar Worker, and the Child with cancer were funded by the American Cancer Society. Subsequently, the Greenleigh Study[6] confirmed the Feldman findings. The California Legislature amended the Fair Employment and Housing Act by the passage of the Siegler Bill (AB 1194) prohibiting employment discrimination against the cancer patient in California.

Work symbolizes adequacy, independence and control over one's affairs and is a means to meet needs and obligations. A quote from Jon, a 42-year-old bookkeeper with a colostomy,[12] summarizes this common feeling: "I received a death sentence twice, once when my doctor told me I have cancer, then when my boss asked me to quit because the cancer would upset my fellow workers. Except for my wife, that job was my whole world!"

Some still doubt that significant employment discrimination for a work-able cancer patient exists.[13,14] Studies by Feldman,[9-11] Smith,[15] and Koocher,[16] have clearly documented its existence. Job rejection on the basis of a past history of cancer happens to 25% to 45% of workers, the higher figure applying to the blue collar worker and youth (Table 6).

TABLE 3
CANCER EMPLOYMENT VS. INCOME[6]

	Percent Employed		*New Unemployed*
ANNUAL INCOME	*At Cancer Diagnosis*	*2½ Yrs After Cancer*	
25,000+	65.7	62.3	3.4
15,000-24,999	63.5	56.1	7.4
7,500-14,999	54.1	43.0	11.1
Under 7,500	35.2	17.6	17.6

TABLE 4
CHANGE IN EMPLOYMENT AFTER CANCER BY AGE[6]

	EMPLOYED				
Age	*Full-Time*	*Part-Time*	*Disability*	*Retired*	*Homemaker*
45 or <	+1%	+4%	+2%	—	−2%
46-64	−15%	+2%	+7%	+5%	+1%
65 & over	−11%	—	+1%	+11%	—

TABLE 5
PERCENT CHANGE IN PRODUCTIVITY[6] AFTER CANCER

	Employed				
Cancer	*Full-Time*	*Part-Time*	*Disability*	*Retired*	*Homemaker*
Prostate	−10	+4	+4	+4	—
Uterus	−8	+1	+2	+7	+1
Breast	−10	+1	+4	+5	—
Oral	−14	+5	+9	+14	—
Leukemia/ Lymphoma	−27	+3	+13	+10	+3
Lung	−26	−3	+13	+10	+3

TABLE 6
EMPLOYMENT ISSUES FOR THE WORKER WITH A CANCER HEALTH HISTORY

STUDY	*n*	*Job Rejection*	*Work-Related Problems*
White Collar[9]	130	22%	54%
Blue Collar[10]	111	45%	84%
Youth[11]	83	45%	25% (Work) 51% (School)
Youth[16]	60	25%	—
NCI Study[15]	95	13.7%	—

Work-related discrimination may be classified into three categories:[12]

1. The most serious includes dismissal, demotion, discontinued health and/or life insurance, reassignment of hours or location of work, no salary increases as given other employees, etc.
2. Work problems arising from attitudes of co-workers; i.e., shunning, mimicry, overt hostility, etc.
3. Problems stemming from workers' own attitudes, anxieties, defensiveness, fearfulness about how they should be perceived by others which have led to avoidance or alienation by the co-workers. This could result in a hostile behavior by the patient to fend off anticipated actions by others and may result in dismissal.

Job discrimination is described by Barofsky[17] as the social death of the cancer patient. Competition is an everyday event in our country and happens daily to all of us in job selection, promotion, training, etc. Job discrimination occurs when the criteria of selection are inappropriate, e.g., age, sex, religion, marital status, or a cancer health history. Such job discrimination should be fought with vigor.

Should the employer be informed of a cancer history? It is legally wrong to falsify a job application, but it is extremely difficult to admit the truth when one knows it might have a negative impact. If, when, and under what circumstances a patient should tell the employer or the potential employer that he or she has had cancer in the past poses an ethical dilemma.

Legal Rights

Cancer patients have rarely taken advantage of their legal rights to win back a job when they have been laid off, or to try to gain access when they have been denied. Barofsky[17] reviewed the litigative literature in 1982 and found only 2 court cases concerning the rights of cancer patients; only 3 union contract arbitration cases which dealt with cancer patients; and only 1.3% of complaints filed from 1974 to 1978 under the Rehabilitation Act of 1973 involving cancer patients. It is probable that more litigation will occur in the future. Perhaps discriminatory employment practices relative to the cancer patient might be eliminated through better cancer information for the employer.

Large companies should be the most altruistic and humanistic in hiring the recovered cancer patient; such applications might average 0.2% of job applicants. The Armed Forces and some governmental agencies are still using discriminatory employment practices, while there has been significant improvement since 1974 in industry.

Each job applicant should be considered individually and fairly on the basis of qualifications and physical ability. Many employers do not understand that cancer is many different illnesses requiring a wide range of treatment. *Most cancer patients are work-able.*

Cancer Caused by the Carcinogens in the Workplace

Wynder and Gori[18] interpret epidemiologic data to conclude that 4% of cancer in males and 2% of cancer in females is caused by occupational factors. Some of the most frequently used carcinogens include: aromatic amines, asbestos, benzene, cadmium, chromium, nickel, polycyclic hydrocarbons, ultraviolet light, vinyl chloride, and ionizing radiation. The Occupational Safety and Health Act (OSHA) of 1971 provides regulations in the workplace and mandates safety standards. Additive effects can occur — for example, asbestos workers who smoke tobacco have a 9-fold increase in lung cancer incidence when compared to asbestos workers who do not smoke. The control of carcinogens in the workplace will continue to interest both Labor[19] and Management and will mandate continuing change in the Workman's Compensation Act which began in 1911.

Economics of Cancer

In the United States in 1977, the direct costs of cancer were estimated to be $9.1 billion; these include hospital and outpatient expenses, physician fees, nursing services, home care and drugs (Table 7). Cancer costs increase yearly with inflation, improved treatment modalities developed through research, and more effective palliation measures, with the

TABLE 7
DIRECT COST OF CANCER CARE[21]

Hospital	56.6%
Physicians Services	16.3%
Nursing Home	3.2%
Drugs	1.5%
Nursing Services	1.3%
Research	8.2%
Other	12.9%

result that patients are treated over longer time intervals and enjoy a better quality of life.

Indirect cancer costs include the economic consequences of the disease other than those in which direct payment is involved; these are estimated to be four times the direct costs. The most important component of indirect costs is wages lost because of morbidity and mortality.

American industry spends at least $4 billion yearly — and the government another $400 million yearly—for sick leave, salary for temporary workers, permanent employee replacement, life insurance costs and lost future earnings as a result of cancer.

The four sites of breast, lung, colo-rectum and uterine cancer account for about half of all cancer in the United States. A major education and screening program in industry *if started now* would save American industry $1 billion annually.[20]

INSURANCE

The U. S. insurance industry is truly a giant; its assets are $700 billion, greater than our nation's top fifty corporations. The industry is exempt from federal trade and antitrust laws, and employs 1.8 million people, three times as many as the U. S. Postal Service.[22]

Americans buy nearly half of the insurance sold in the world. Insurance payback varies from 10¢ to 65¢ on the premium dollar. Blue Cross payback is 93¢ of the premium dollar.

Insurance is defined in the Insurance Code (Section 22) as a method whereby one undertakes to indemnify (protect) another against loss, damage, or liability arising from a contingent or unknown event. Insurance companies underwrite policies for individual applicants by considering specific information such as age, sex, past medical history, personal habits, etc.

Group insurance applicants are generally not individually underwritten, i.e., not subject to medical examination by employers, especially if the group consists of ten or more people. The insurance company is able to maintain its profit margin by adjusting the group's premium rate from year to year on the basis of benefits paid. It is therefore the employer who is most concerned about each employee's health risk, since the group premium will probably be affected. Health history thus represents a formidable barrier to obtaining both employment and affordable insurance for the individual with a cancer health history.

Health Insurance

The Health Insurance Institute estimates that 90% of Americans (excluding the military) have health insurance, some with multiple policies. Eighty percent of health coverage is provided by group insurance.[23] Most of the workforce have cancer coverage, usually paid for by the employer, or shared by the employee; health benefits may vary considerably from company to company. The Third National Cancer Survey showed that for patients under age 65, Blue Cross and private insurers were the source of payment in over 77% of cancer cases. For patients over 65, Medicare paid cancer expenses in nearly 88% of cases.

Individual health insurance underwriting is based on evidence of insurability, as is individual life insurance. Adequate health insurance coverage is often the difference between a financial catastrophe and economic peace of mind.

Life Insurance

In 1976 more than 150 million Americans held life insurance worth more than $2.1 trillion.[24] Three percent of applicants were noninsurable. Five percent of applicants for life insurance were insured with a higher than normal premium (rated). Therefore 92 percent of applicants were insured at standard risk.

Insurance Coverage at Time of Cancer Diagnosis

More than 90% of employees were covered by health insurance at the time of cancer diag-

nosis (Table 8).[6,10,13] Most health coverage was group insurance and seemed superior to that of individual health policies.[6] In the California series,[6] 35.7% had more than one policy, 61.6% had one policy and only 2.7% were uninsured.

Coverage of hospital and medication costs for the cancer patient varied from 100% to nil.[6]

100% coverage	36.9%
>50% coverage	54.0%
<50% coverage	3.1%
little coverage	2.0%
no coverage	2.3%

Most health policies are of the guaranteed renewable type; maximum benefits may be used up as a result of illness. Some health insurance policies are not guaranteed renewable.

Life insurance is less common than health insurance at the time of cancer diagnosis, and varied from 66 to 80% (Table 8). In contrast to health insurance, most life insurance was of the individual policy type as follows.[13]

70% Whole Life
- 70% premium payable till death
- 30% premium payable to a specific age

17% Term (60% group)
13% Endowment

TABLE 8
PERCENT WITH INSURANCE IN FORCE AT TIME OF CANCER DIAGNOSIS

	Mayo[13]	*Feldman*[10] *Blue Collar*	*Greenleigh*[6]
Health	93.8	91.0	98
Life	80.0	66.0	N/A

Disability Payment

A total of 112 patients (11.9%) in the Mayo survey[13] (n=940) received some disability payment; 13 from more than one source:

Social Security	44%
Insurance	28%
Employer Plan	23%
Veterans Administration	3%
Union Welfare	1.6%

Disability is a condition that may be total or partial, permanent or temporary. These parameters are not well defined for the cancer patient. Total disability means termination of employment and termination of benefits, often including health and life insurance.

Who is Without Health Insurance?

Some 26.5 million Americans (12.6%) have no health insurance. There are regional differences in coverage as follows:

West	16.2%
South	16.2%
Northeast	8.3%
North Central	9.3%

In the U.S. 11.7% of the white and 18.1% of the non-white population (ages 18-64) have no health coverage. The younger population is more often without health coverage than the older groups:

Age 18-24	21.9%
Age 25-54	12.1%
Age 55-64	11.2%

Before age 65 some without health coverage may be eligible for Medicaid/MediCal when an illness such as cancer occurs. At age 65 many Americans without health coverage become eligible for Medicare without concern for prior health history.

Six to twenty-one percent of patients with cancer had no health insurance at the time of diagnosis[6,10,13] (Table 9). Twenty to thirty-four percent of patients in the same studies had no life insurance at the time of cancer diagnosis (Table 9).

TABLE 9
POPULATION WITHOUT INSURANCE

		Ages	*No Insurance Health*	*Life*
	U.S.	ALL	12.6%	31.8%
	Mayo[13]	19-64	6.2%	20%
Cancer	Feldman[10]			
Patients	Blue collar	25-50	9.0%	34%
	Greenleigh[6]	20-70	20.9%	

Insurance Changes After Cancer (Table 10)

The Greenleigh study[6] reported that 24.2% had problems with health insurance after cancer. Five percent lost health insurance due to a loss of job or a change of job that was cancer-related. Two percent had insurance cancelled and 3.3% had benefits reduced, creating a strong negative impact on those so affected; 1.5% found that their insurance was no longer valid. Ten percent became eligible for either Medicaid or Medicare.

TABLE 10
POTENTIAL CHANGE IN INSURANCE AFTER CANCER TREATMENT

Locked into present job to maintain insurance benefits
Existing Coverage
Cancellation
Reduced benefits
Increased premium
Cancer exclusion
New insurance application
Refusal
Cancer Exclusion
Higher Premium
Waiting period for coverage
Disability
Insurance loss
?Medicare/Medicaid eligibility
Retirement
Insurance loss
Job Loss
Insurance loss
New Employment
?Loss of fringe benefits
Financial Crisis
?Medicaid/Medi-Cal eligibility
Age 62-65
Medicare eligibility

The Mayo study[13] found fewer patient complaints about health insurance (17.5%) than in the Greenleigh study; an insurance review committee[13] considered one-third to one-half of complaints to be insurance discrimination. Four percent lost their job and therefore their insurance; 1.2 percent had their health insurance cancelled and 0.6% had premium increases. The Mayo study[13] reported that 9.2% patients perceived problems with life insurance, 3% with employment and 0.5% with vocational rehabilitation (too few users or awareness of vocational rehabilitation to be significant).

Neither study[6,13] is detailed enough or was confirmed by insurance crosscheck to certify the true extent of the insurance problems; however, they point out that there are problems which deserve further study.

New Insurance After Cancer

One to two percent of the U. S. population now living are cured of cancer; 0.5% of the U. S. population is currently receiving cancer treatment. It is easier for these people to retain insurance in force prior to the cancer diagnosis than it is to acquire new insurance after a cancer diagnosis. A variety of problems are encountered by people seeking new insurance coverage with a cancer health history.

Group insurance can provide both health and life insurance for persons with a cancer history when work-able at a cost somewhat higher than if the group were composed only of individuals with no present or past health problems.

Individual health or life insurance may be offered by the insurance industry when the applicant cannot meet normal health requirements by added premiums, a waiver for existing or prior health conditions, or by a waiting period before the coverage becomes effective.

New applicants for insurance in an existing group after a cancer health history may find a variety of requirements or restrictions (Table 11). Some may be required to complete a health history and others may be required to undergo a physical examination.

Preexisting health conditions may be covered by group contracts after a treatment-free waiting period of 3-12 months, with an average of 3.8 months.

About 10% of insurance carriers exclude employees from group coverage because of a history of a serious illness. About 10% of carriers would raise the group premium when employees with a past history of cancer are included in the group. When group rates are increased, 88% of carriers state that they will

TABLE 11
NEW APPLICANT REQUIREMENTS TO JOIN AN EXISTING GROUP INSURANCE PLAN[13]

Type of Insurance	*Evidence of Insurability*	*Current Health Status*
Life	51%	57%
Health	44%	60%
Disability	42%	69%

TABLE 12
PROBLEMS ENCOUNTERED BY A NEW EMPLOYEE WITH A CANCER HISTORY APPLYING FOR GROUP INSURANCE[6,13]

Insurance	*Refused*	*Cancer Exclusion*	*Waiting Period*	*Increased Premium*
Health	23%	5-13%	30-40%	10%
Life	27%	4-11%	8-30%	8%
Disability	—	16%	18%	10%

tell the employer why the group rate is increased.

New Health Insurance After Cancer

One-fourth of all cancer patients in the Mayo study[13] applied for new health insurance after cancer treatment. Twenty-three percent were refused (Table 12). Three-quarters obtained health insurance which one-sixth of them would not accept due to high premiums, five percent were given a cancer exclusion, and 30% had waiting periods from 1-10 years, 36% more than 5 years (Table 13).

Individual health insurance applicants with a cancer health history usually face a longer waiting period of five to ten years with high premiums and often a cancer exclusion.

TABLE 13
WAITING PERIOD FOR NEW INSURANCE EXPERIENCED BY 30% OF APPLICANTS WITH A CANCER HEALTH HISTORY[13]

Time Delay	*Type of Insurance* *Health*	*Life*
<1 Year	19.2%	4.2%
1-2 Years	34.6%	16.7%
2-4 Years	9.6%	12.5%
5-10 Years	36.5%	66.8%

New Life Insurance After Cancer

One-seventh of the former cancer patients in the Mayo series[13] applied for new life insurance; 27% were refused life insurance and 49% did purchase life insurance, about half, group and the rest, individual (Table 12). Thirty percent were given waiting periods of 1-8 years, with two-thirds more than 5 years (Table 13). Four percent were given waivers which excluded payment if death was due to cancer. Rating of applicants was common but details were unknown. An occasional policy was nonrenewable. Neither cancer exclusion or nonrenewable policies should ever be written.

Applicants with a cancer health history for individual life insurance will most likely be rated with a long waiting period.

Current cancer statistical data for underwriting are based on the NCI SEER Program.[23] Such data have a lag time which does not reflect present-day survival and needs more refinement according to newer staging methods such as those from the AJC (Am. Joint Committee) or the U.I.C.C.

A survey by Fitzgerald[24] of 45 life insurance companies showed that all 45 would underwrite some patients with a cancer history; 44 would apply a waiting period of up to 10 years; and some would apply ratings for varying time intervals. Nine of the 45 would exclude all hematologic malignancies except Hodgkin's disease; this practice is unrealistic today. Eleven of thirty would increase the waiting period if a patient had adjuvant chemotherapy or radiotherapy, which is also unfair.

DISCUSSION

The insurance industry remains unchallenged in its decisions regarding insurability of the cancer patient, defending its decision on sound business practice. Current underwriting procedures are frequently outdated and need to be individualized: they should be based on cancer stage, treatment, current survival data, etc.

Competition in underwriting may relax underwriting standards. This is economically feasible now that cancer treatment is more successful. A list of companies willing to underwrite individuals with a cancer health history may be obtained from "Who Writes What," a publication listing companies who insure those with impairments or hazardous occupations.

Failure to provide health coverage to many with a cancer history[25] will place an increased burden on the taxpayer who is then called on to provide care for those people which private insurance has not or will not cover. Critical to the solution are questions regarding what responsibility for health care belongs to the private sector, to the public sector, and to the individual. Is insurance competition or regulation the solution?

Some unfair insurance practices include[25]:

Cancellation if substantial medical claims; excessive exclusion periods for new insurance; excessive premiums for the recovered cancer patient; permanent cancer exclusion; exclusion for benign or precancerous conditions; exclusion for skin cancer or "minimal" cancer; refusal to permit conversion of group to individual coverage; loss of insurance coverage at retirement before eligible for Medicare; inadequate coverage for rehabilitation, reconstructive procedures, or outpatient services; lack of insurance reimbursement for cancer screening and cancer prevention in high risk groups.

Pooling of the insurance risk in auto and workman's compensation insurance for persons with cancer health history may be a future trend for those without coverage. Medicaid/Medicare/MediCal can be obtained after two years of disability.

Precancerous conditions such as carcinoma in situ of the cervix and superficial melanoma (Clark Level One) are 100% curable and should not be considered abnormal health conditions. Prior treatment for fibrocystic disease of the breast or a benign colon polyp do not deserve a rating, rider, exclusion or delay in coverage. Prior treatment for a basal or squamous cell cancer of the skin should not influence insurance underwriting.

Our population is highly mobile for a myriad of reasons: change in employment, career change, change in geographic location because of a family member or for health reasons, change in the economic conditions of a community, etc. An individual with a cancer health history may find himself in a Catch-22 situation because a change in employment may affect insurance protection.[26]

Until there is some mechanism to transfer existing health insurance coverage to new employment, persons who have had cancer will be locked into their pre-illness jobs or lose benefits for themselves and dependents. Need for continued insurance is greatest for low income groups.

Many recovered cancer patients are unaware that at retirement, group life insurance[26] may be converted to individual life insurance within 31 days without medical proof of insurability; this is most important to the disabled person or the individual with a cancer history.

Some insurance companies plan to discontinue underwriting individual health insurance due to the high cost of claims. Containment of health expenditures of governmental and insurance health maintenance organizations is being tried by using HMO, Preferred Provider Organization and Diagnosis Related Groups. Large corporations are self-insuring and this practice may extend to smaller companies. Insurance companies will then be called upon to administer the claims.

Some changes have occurred in the past 60 years in the insurability of recovered cancer patients, but the progress lags far behind employability of such persons.

More data are needed on the employment experience and insurance liability for the more than five million Americans with a past history of cancer and the nearly one million Americans with a newly diagnosed cancer this year. The joint solution of this socioeconomic problem by employers, insurance companies, government, and even the American Cancer Society seems important.

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STATE OF COLORADO

CIVIL RIGHTS DIVISION
DOROTHY J. PORTER, Ph.D., Director

Department of Regulatory Agencies
Wellington E. Webb
Executive Director

Richard D. Lamm
Governor

June 17, 1986

Benjamin Schatz, Esquire
Director, AIDS Civil Rights Project
National Gay Rights Advocates
540 Castro Street
San Francisco, California 94114

Dear Mr. Schatz:

In response to your letter of May 30, 1986, requesting information on the position of the Colorado Civil Rights Commission concerning AIDS and related health conditions, Dorothy J. Porter, Ph.D., director of the Colorado Civil Rights Division, asked that I send you the enclosed materials:

1) 1 -- Excerpt from Minutes of the March 28, 1986, Meeting of the Colorado Civil Rights Commission.

2) 1 -- Laws, Rules, and Regulations of the Colorado Civil Rights Commission (Note: See especially physical handicap statute and substantive rules on physical handicap, which are highlighted in yellow in the Table of Contents.)

Also, for your information, to date no charge of AIDS discrimination has been filed with our agency.

We hope that this information proves helpful to you. Thank you for your interest in the Colorado Civil Rights Commission/ Division.

Sincerely,

Elaine Lee

Elaine Lee, Public Information Specialist
Colorado Civil Rights Division

enclosures

c: Dorothy J. Porter, Ph.D., Director

1525 Sherman St., Room 600C, Denver, Colorado 80203, (303) 866-2621

BUSINESS BEFORE THE COMMISSION (Excerpt from Minutes of CCRC Meeting March 28, 1986)

AIDS--Acquired Immuned Deficiency Syndrome--AS A HANDICAP

The director of the Colorado Civil Rights Division requested specific direction of the Commission so that what she and the staff determine concerning charges of discrimination because of having AIDS, would not be a "surprise" or against the views of the Commission when such a case would come before it.

When questioned as to why any formal policy statement should be made for this, over any other disease that is severely dibilitating (and apparently fit the description of a "handicap" under Colorado law), Dr. Porter pointed out that the Division is getting inquiries on what the stand is of the Commission on this particular disease's classification (whether or not it is considered a "handicap") and that specific inquiries from other state agencies have come to the Division; more recently from the city officials of Ft. Collins. This is a rather new, uncharted area of a controversial subject that is not really apparent to some (or accepted) to be handicap. Ft. Collins' inquires were made to see if the Colorado Civil Rights Commission was including AIDS as a handicap, which rulings would supersede any city ordinances.

There are emotional and social implications in this topic; in Colorado (as in other states) a bill is being considered in the legislature to require quarantining of victims of the disease. As expected, there is tremendous group and special interest objections to implementing such a program with fears of establishing questionable precedents against a special group of persons, primarily homosexuals. It is particularly troubling that this is happening because, based on currently known medical information, the disease is not readily communicable between persons. It is the public's general perception that makes AIDS "not like" other known disabilities and illnesses.

Dr. Porter has an extensive manual from a teleconference she participated in, which outlines a thorough study of the illness. It is not clearly delineated, to some people whether AIDS is a physical handicap covered under current laws, since it was not an issue or known about at the time such laws were passed, and question whether it can be considered under current physical handicap regulations.

The Commissioners reviewed its definition of "handicap" and agreed that what is known about the consequences of having AIDS--that is, it is a serious illness for which there is no known cure, is dibilitating for some period of time leading to the prevention/limitation on the victim's ability to perform major life and employment functions--anyone with the disease or perceived to have the disease of AIDS can file a handicap discrimination charge.

Further concerns of the general public, resulting from being around or working with such persons is beyond the Commission's jurisdiction, and are concerns that labor unions, the medical and educational community, emp oying management personnel and perhaps the courts must deal with in an unclear, uncharted course in our society, where little history or case law is available as guidelines. Rights of those with the disease must be recognized and defended, but rights of those of persons who feel threatened for their own safety and health are also paramount. Fears, negative emotional, irrational views and judgments can be mitigated to some degree with knowledge of what is known at the present and observations of experiences of the medical community. What is known at the present leads to the conclusion that the disease is not readily communicable in ordinary social and business contacts.

For the record, the Commission declared that if an individual has AIDS, the Division shall take a charge for the Civil Rights Commission as a handicap charge, and each charge is to be treated as such on a case-by-case basis.

LA Times — Col. 4

Sunday, [illegible], 1986/Part V 5

An Invitation to Senseless AIDS Bias

Ruling Would Give Free Reign to Employers' Unfounded Fears

By MICHAEL MOORE

Assistant Atty. Gen. Charles Cooper, in a memorandum issued by the Justice Department, has ruled that federally assisted hospitals or clinics can fire AIDS victims (or non-victims who test positive for AIDS antibodies) without running afoul of federal laws prohibiting discrimination against any "handicapped individual."

According to Cooper, as long as the AIDS victim is fired because his or her employer fears transmission of the disease to others, then the employee has no complaint, no matter how unfounded the employer's fear.

Cooper's ruling is an extremely ill-timed, badly reasoned and badly motivated bit of political decision-making that ought to be ignored by the Department of Health and Human Services (to whom the advice was given) and by the courts when they address this issue in the inevitable litigation that will follow. It should also be ignored when California voters face a like issue this coming November when they pass on an equally ill-reasoned and badly motivated proposal, the initiative sponsored by followers of Lyndon LaRouche that would restrict employment and educational opportunities for AIDS victims.

Cooper claims that his conclusions were "compelled" by the narrowness of the language of the federal statute that prohibits discrimination only against "handicapped individuals." Yet the definition of the phrase, "handicapped individuals," was explicitly broadened by Congress in 1974, over President Richard M. Nixon's veto, to include anyone who is or has been substantially impaired "in one or more of such person's major life activities," or is regarded as having such an impairment by others.

Recognizing that having AIDS is such an impairment and thus a handicap, Cooper nonetheless ruled that the *transmissibility* of AIDS, be it real or perceived, is not such a handicap. Thus the employer who fires an AIDS victim because he believes that the employee might *transmit* AIDS, not because he believes that the employee *has* AIDS, is exempt from the anti-discrimination ban of the federal statute.

This has the curious result of meaning that an employer who fears transmissibility can fire an employee without any evidence on which to base his belief that AIDS can be transmitted by casual contact.

Had Cooper ruled that AIDS and its transmissibility are together one, indivisible handicap, the result would not have been that an employer would be prevented from firing his employees who are AIDS victims. On the contrary, only handicapped workers who are "otherwise qualified" for their jobs can use federal law to bar employers from firing them, and to have a communicable disease is not to be qualified for most jobs.

Under such an alternative ruling, however, an employer would have to possess some evidence supporting his fear that AIDS could be transmitted by the kind of contact the employee's job involves. Surely, the serious harm resulting from loss of employment should be suffered by those already suffering with AIDS only if there is evidence suggesting at least some degree of risk of transmission. Such evidence should be directly relevant to the tasks that each job involves, which is clearly preferable to Cooper's blunderbuss approach.

In addition to allowing employers to fire AIDS victims wholesale with no evidence of transmissibility, Cooper's ruling has troublesome implications. By Cooper's reasoning, we presumably should distinguish an employer's *dislike* of wheelchair-bound persons from, let's say, an employer's *belief* that wheelchair-bound persons bring bad luck. Armed with this distinction, we should then say that an employer can fire a handicapped employee not because of the handicap, but because the employer believes that the employee is unlucky. Unluckiness is not a handicap any more than is transmissibility of disease, even though each is a characteristic associated by some with handicapped persons.

Indeed, why stop here? Why not say that under other anti-discrimination statutes we should distinguish employers' *dislike* of blacks, Jews or women from employers' *beliefs* that blacks are lazy, that Jews are grasping, or that women are stupid. If we make this distinction, then blacks, Jews or women could be discriminated against with impunity so long as the grounds for such treatment were not that such persons were black, Jewish or female but only that they were lazy, grasping or stupid.

Cooper has sought to forestall some of such absurd implications. In a footnote to his memo he distinguishes employer beliefs based on stereotypes about blacks, Jews, women or the handicapped from beliefs not so based. Yet if AIDS is a handicap, as Cooper concedes, why is not the totally unfounded belief in its transmissibility by casual contact part of the stereotypical beliefs about AIDS victims? Witness LaRouche, whose prejudice against AIDS victims is essentially manifested by his beliefs in the easy transmissibility of AIDS.

Cooper's claim that his conclusion is "compelled" by the "plain language" of the Rehabilitation Act is hard to credit as anything but a pretext for a political decision that's hard to justify if openly made. It is particularly difficult to believe, coming as it does from the same individual who so recently defended before the Supreme Court a notion of "handicap" so expansive as to include Baby Doe treatment cases.

Such "compulsion" is also hard to credit in light of the opposite "compulsion" felt by those in the Civil Rights Division of the Justice Department who drafted a ruling reaching a conclusion contrary to Cooper's—a draft that three weeks ago was apparently overruled by Reagan Administration appointees in the department.

When issuing rulings about the permissible and impermissible motivations of employers firing AIDS victims, those heading the Justice Department should ask some motivational questions of themselves: Is their licensing of discriminatory firing of AIDS victims motivated by some legitimate concern such as public health or the unfortunate "compulsion" of too-narrow statutory language? Or is this ruling, like the LaRouche initiative in California, motivated by conservatives' dislike for gays and their activities, for which the AIDS scare is a convenient pretext?

If the latter is the case, then this discriminatory ruling, like the discriminatory firings that it would permit, should be even more forcefully disavowed when the issue is decided in the courts.

Michael Moore is the Robert Kingsley Professor of Law at USC.

Clergy Can't Duck This Moral Imperative

By HARVEY J. FIELDS

commemorations of the 10th anniversary

Human Rights Law Protects AIDS Victims

TEXAS Montrose Voice 11/8/85

The director of the Texas Commission on Human Rights said Tuesday that a 1983 law protecting handicapped workers from employment bias applies to people with AIDS.

William Hale, director of the state commission which works with the federal Equal Employment Opporunity Commission, said that the law bans employment discrimination against persons with permanent physical or mental handicaps. He added that AIDS victims would be included because the disease is physical and permanent.

The law prohibits discrimination against persons whose handicap does not prevent them from performing their job duties. Hale believes AIDS victims, especially in the early stages of the disease, can satisfactorily perform most jobs.

Under the law, AIDS victims denied employment would file a complaint with the commission. An investigation would be used to determine whether the employer knew the applicant had AIDS and if that was a factor in refusing to hire the complainant.

Although the agency has yet to receive any complaints from AIDS victims, Hale expects to receive some "sooner or later."

Texans With AIDS Protected From Job Bias

N.Y. Native 12/2/85

AUSTIN—A 1983 state law protecting handicapped workers from employment discrimination applies to people with AIDS, according to William Hale, director of the Texas Commission on Human Rights. The law bans employment bias against people with permanent physical and mental handicaps. Hale said the law protects people with AIDS because the syndrome is both physical and permanent. He also indicated that people with AIDS, especially during the early stages of the ailment, are capable of performing most jobs.

Texans with AIDS denied employment because of their illness can file a complaint with the commission, reports the *Montrose Voice*. The agency has yet to receive any complaints of that nature, but Hale predicted that some would eventually be reported.

WASHINGTON, DC 11/1

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL
DISTRICT BUILDING
WASHINGTON, D. C. 20004

IN REPLY REFER TO
LCD:PLR:MAH:
LCD:1077

October 15, 1985

The Honorable John Ray
Councilmember At Large
Council of the District of Columbia
Washington, D.C. 20004

RE: Applicability of the D.C. Human Rights Act of 1977 to Persons with Acquired Immune Deficiency Syndrome (AIDS)

Dear Councilmember Ray:

By letter of September 10, 1985, you have sought the advice of this Office on the applicability of the District of Columbia Human Rights Act of 1977, D.C. Code §1-2501 et seq. (1981 ed.), to discrimination against persons with acquired immune deficiency syndrome (AIDS).

The Human Rights Act prohibits discrimination based on physical handicap in employment, education, public accommodations, and housing. "Physical handicap" is defined as "a bodily or mental disablement which may be the result of injury, illness or congenital condition for which reasonable accommodation can be made." D.C. Code §1-2502 (23) (1981 ed.). For guidance on coverage of this provision, the D.C. Office of Human Rights and District of Columbia courts have looked to the analogous federal statute, which prohibits handicap discrimination in federally assisted programs. §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1982); see also Miller v. American Coalition of Citizens with Disabilities, 485 A.2d 186 (D.C. 1984). The Rehabilitation Act defines

"handicapped individual" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. §706 (7) (B) (1982).

According to the Centers for Disease Control of the U.S. Public Health Service, AIDS is a serious disease which reduces the body's immune response, leaving the affected person vulnerable to life-threatening infections and malignancies. 34 Morbidity and Mortality Weekly Report No. 1, p.4 (January 11, 1985). Depending on the specific course of the disease, it seems inevitable that AIDS would constitute a "physical disablement" resulting from illness within the meaning of the Human Rights Act, and an impairment substantially limiting the persons's "major life activities" 1/ as defined by the federal Rehabilitation Act. While there does not appear to be any judicial decision directly on point, this conclusion is consistent with the decision in New York State Association for Retarded Children, Inc. v. Carey, 612 F.2d 644 (2d Cir. 1979). In that case a school board proposed to segregate from other students certain mentally retarded children infected with hepatitis B. (Hepatitis B is a serious viral disease which, like AIDS, is transmitted by bodily fluids.) The court struck down the plan as a violation of section 504 of the Rehabilitation Act, holding that the board had failed to justify its restrictive policy as necessary to prevent the spread of the disease. Such evidence was needed, the court held, in order to counter a strong showing of harm to the children whose isolation was proposed. Id. at 650-51.

In my opinion, therefore, the Director of the Office of Human Rights is correct in concluding in her June 24, 1985 letter that the provisions of the Human Rights Act regarding discrimination on the basis of handicap are applicable to discrimination against those suffering from AIDS as well as those

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1/ Regulations promulgated by the Department of Health and Human Services define "major life activities" to mean "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. §84.3 (j) (2) (ii) (1984).

"regarded" as having the disease, whether correctly or incorrectly.2/ An individual may claim the protection of the Human Rights Act regardless of the basis upon which that individual is categorized as suffering from AIDS, including the results of a test for antibodies or membership in a group at higher risk of infection.3/

2/ The Director of the Office of Human Rights has interpreted the handicap discrimination provisions of the Human Rights Act, like the federal Rehabilitation Act, to cover persons with a record or history of impairment, and persons who are "regarded" as impaired. The legislative history of the federal provision on this point explains the drafters' intentions:

> The new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection includes...those persons who do not in fact have the condition which they are perceived as having, as well as those whose mental or physical condition does not substantially limit their life activities....Both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

Joint Conference Report, Sen. Rep. No 93-1270, 93d Cong., 2d Sess., 35003, 35010, reprinted in [1974] U.S. Code Cong. and Ad. News 6373, 6389. As a federal court has noted, "It is little solace to a person denied employment to know that the employer's view of his or her condition is erroneous. To such a person the perception of the employer is as important as reality." E.E. Black, Ltd. v. Marshall, 497 F.Supp. 1088, 1097 (D. Hawaii 1980).

3/ In one complaint filed with the U.S. Department of Health and Human Services, an employee has charged that his employer's decision to place him on unpaid leave after it was disclosed that he had a condition that sometimes precedes AIDS constituted handicap discrimination. The administrative complaint alleges that he was "regarded" as handicapped by the employer, and was therefore within the protection of §504 of the Rehabilitation Act, 29 U.S.C. §706 (7) (B) (1982). The complaint is currently under investigation. Doe v. Charlotte Memorial Hospital, reported in Lambda Update, Fall 1985, at 4, 6-7.

The specific applications of the Human Rights Act to the questions which you pose are discussed below.

Employment Discrimination

1) Does the Act prevent an employer from firing, refusing to hire or taking other discriminatory action against a person diagnosed as having, or rumored to have, AIDS?

The D.C. Human Rights Act provides:

> (a) General. - It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the ...physical handicap...of any individual:
>
> (1) To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee;
>
> (2) To fail or refuse to refer for employment, or to classify or refer for employment, any individual, or otherwise to discriminate against, any individual; or
>
> (3) To exclude or to expel from its membership, or otherwise to discriminate against, any individual; or to limit, segregate, or classify its membership; or to classify, or fail or refuse to refer for employment any individual in any way, which would deprive such individual of employment opportunities, or would limit such employment opportunities, or otherwise adversely affect his status as an employee or as an applicant for employment; or
>
> (4) (A) To discriminate against any individual in admission to or the employment in, any program established to provide apprenticeship or other training or retraining, including an on-the-job training program;
>
> ***

> (b) Subterfuge. - It shall further be an unlawful discriminatory practice to do any of the above said acts for any reason that would not have been asserted but for, wholly or partially, a discriminatory reason based on the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, physical handicap, or political affiliation of any individual.

D.C. Code §1-2512 (1981 ed.).

The Act also provides for a general "business necessity" defense applicable to any allegation of discrimination:

> Any practice which has a discriminatory effect and which would otherwise be prohibited by this chapter shall not be deemed unlawful if it can be established that such practice is not intentionally devised or operated to contravene the prohibitions of this chapter and can be justified by business necessity. Under this chapter, a "business necessity" exception is applicable only in each individual case where, it can be proved by a respondent that, without such exception, such business cannot be conducted; a "business necessity" exception cannot be justified by the facts of increased cost to business, business efficiency, the comparative characteristics of 1 group as opposed to another, the stereotyped characterization of 1 group as opposed to another, and the preference of co-workers, employers, customers or any other person.

D.C. Code §2503(a) (1981 ed.).

Complaints of intentional handicap discrimination under the Human Rights Act proceed according to the well established principles of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The complainant must initially establish a prima facie case of discrimination by proving that he is a member of the protected class and was denied employment or another benefit for which he was otherwise qualified. Miller v. American Coalition With Disabilities, Inc., 485 A.2d 186, 189-90 (D.C. 1984). The

burden then shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employee's rejection. If the employer succeeds, the burden shifts back to the employee to prove that the stated explanation is in fact a pretext for discrimination. Id. at 190.

An employer would be prohibited from firing, refusing to hire, or taking other discriminatory action against an individual on grounds that the person has AIDS unless he could show (1) that he had a legitimate, nondiscriminatory reason for the action (such as legal disqualification for the job), [4] / or (2) that the decision was based upon a business necessity. In this regard it should be noted, however, that allegations of business necessity are carefully scrutinized. Ross v. Gama Shoes, Inc., 23 E.P.D. ¶31,150 (D.C. Super. Ct., July 21, 1980) (employer's fear of liability for damage caused by employee's violent seizures does not support a finding that his removal was justified by business necessity).

Reasonable Accommodation

2) Could an employer rely on the "reasonable accommodation" clause to act against an AIDS victim in a manner that otherwise would be found illegally discriminatory?

As noted above, the Human Rights Act prohibits discrimination based on any "physical or mental disablement...for which reasonable accommodation can be made." D.C. Code §1-2502 (23) (1981 ed.). Reasonable accommodation is a term which originated in regulations promulgated under the federal Rehabilitation Act, 45 C.F.R. §84.12 (1984). Those regulations extend protection only to a "qualified" handicapped person, which is defined (with respect to employment) as one who, with reasonable accommodation, can perform the essential functions of the job. 45 C.F.R. §84.3 (k) (1) (1984). The regulations stipulate that an employer must make a reasonable accommodation for a handicapped employee unless to do so would impose an "undue hardship" upon the employer. 45 C.F.R. §8412.

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[4] / A lack of qualification might be shown where licensing or regulatory requirements prohibit performance of the duties in question by a person who has been diagnosed as having AIDS -- as distinguished from a person who has a positive HTLV-III antibody test result (see page 11, infra). The regulations governing "Hospital Personnel and Operations," 22 D.C.M.R. §2103.3, and "Food Operations," 23 D.C.M.R. §2200.1, prohibit any person with a communicable disease from being employed by a hospital to perform direct patient care or engaging in work involving contact with unprotected food for human consumption. Acquired immune deficiency syndrome is defined as a communicable disease in 22 D.C.M.R. §201.5(a).

Rather than defining those "qualified" handicapped persons against whom discrimination is prohibited, the Human Rights Act defines the protected class of handicapped individuals as those whose disablement may reasonably be accommodated. The effect is the same: a handicapped person lacking a capacity essential to performance of the job (as, for example, good eyesight is essential for a school bus driver) need not be hired, either because he is not qualified, or because his disablement cannot be reasonably accommodated.

In this respect, therefore, a person with AIDS is not protected from discrimination under the Human Rights Act when his or her condition cannot reasonably be accommodated. In order to prevail on that defense, however, the employer must prove that there is no accommodation that would enable the person to perform the job, or that the desired accommodation would impose undue hardship.

Educational Discrimination

3) Does the Act require educational institutions, both public and private, to admit AIDS patients to regular classroom instruction and all other school activities on the same basis as other students?

The Human Rights Act provides:

> It is an unlawful discriminatory practice ... subject for an educational institution:
>
> (1) To deny, restrict, or to abridge or condition the use of, or access to, any of its facilities and services to any person otherwise qualifed, wholly or partially, for a discriminatory reason, based upon the ... physical handicap of any individual...

D.C. Code §1-2520 (1) (1981 ed.). The act defines "educational institution" to include:

> any public or private institution including an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system or university; and a business, nursing, professional, secretarial, technical, or vocational school; and includes an agent of an educational institution.

D.C. Code §1-2502 (8) (1981 ed.).

The act's definition of "physical handicap" as a disablement for which reasonable accommodation can be made is equally applicable in the educational context. An educational institution which restricts use of its services or facilities by

persons diagnosed as having AIDS may seek to prove that the student's illness cannot reasonably be accommodated by a less restrictive policy. That conclusion must be shown to be based upon evaluation of the genuine medical risks, however, and the response must be carefully tailored not to compromise the individual's rights more than is necessary. New York State Association for Retarded Children, Inc. v. Carey, supra.

The business necessity defense of D.C. Code §1-2503(a) is also available to educational institutions charged with handicap discrimination. While I am aware of no cases applying a business necessity defense in an education context, an institution might succeed if it can show that its business "cannot be conducted" without the specific restrictive policies it has adopted.5 /

Public Accommodations

4) Does the Act prohibit restaurants, hotels, and other public accommodations from denying service to a person with AIDS?

The Human Rights Act provides:

> (a) General. - It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based on the...physical handicap...of any individual.
>
> (1) To deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations;
>
> (2) To print, circulate, post, or mail, or otherwise cause, directly or indirectly, to be published a statement, advertisement, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation will be unlawfully refused, withheld from or denied an individual; or that an individual's patronage of, or presence at, a place of public accommodation is objectional, unwelcome, unacceptable, or undesirable.

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5 / See p. 6, supra.

> (b) Subterfuge. - It is further unlawful to do any of the above said acts for any reason that would not have been asserted but for, wholly or partially, a discriminatory reason based on the...physical handicap...of any individual.

D.C. Code §1-2519 (1981 ed.). As in the case of other types of discrimination, the Human Rights Act would prohibit any denial of service to or other discriminatory treatment of an individual because he or she had AIDS unless a "business necessity" were shown. The discriminatory policy could be justified by "business necessity" if the respondent were able to prove that its business could not be conducted in the absence of the policy.

Housing Discrimination

5) Does the Act require owners and agents of rental housing, real estate brokers, and real estate salespersons to treat AIDS victims on the same basis as all other persons in housing rental and sales transactions?

The Human Rights Act makes it an unlawful discriminatory practice for any individual, on the basis of physical handicap:

> (1) To interrupt or terminate, or refuse or fail to initiate or conduct any transaction in real property; or to require different terms for such transaction; or to represent falsely that an interest in real property is not available for transaction;
>
> (2) To include in the terms or conditions of a transaction in real property, any clause, condition or restriction;
>
> (3) To refuse to lend money, guarantee a lc n, accept a deed of trust or mortgage, or otherwise refuse to make funds

available for the purchase, acquisition, construction, alteration, rehabilitation, repair or maintenance of real property; or impose different conditions on such financing; or refuse to provide title or other insurance relating to the ownership or use of any interest in real property;

(4) To refuse or restrict facilities, services, repairs or improvements for a tenant or lessee;

(5) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to a transaction, or proposed transaction, in real property, or financing relating thereto, which notice, statement, or advertisement unlawfully indicates or attempts unlawfully to indicate any preference, limitation, or discrimination based on...physical handicap...; or

(6) To discriminate in any financial transaction involving real property, on account of the location of residence or business (i.e. to "red-line").

D.C. Code §1-2515. The act also prohibits the practices of "blockbusting" and "steering," §1-2516, and requires any violations of the act by real estate brokers or sales personnel to be reported to the Real Estate Commission for use in possible suspension or revocation proceedings, §1-2517.

The Human Rights Act contains an exemption for rental of housing in a building in which the owner or members of the owner's family reside, and which has accommodations for not more than two families living independently, or five families if the owner anticipates sharing a kitchen or bath with the prospective tenant. D.C. Code §1-2518 (1981 ed.).

If not within the exception stated above, evidence of a refusal to sell or rent housing to any person because he or she has been diagnosed as suffering from AIDS would establish a prima facie case of handicap discrimination under the Human Rights Act. The burden would then shift to the respondent to prove that such refusal or other discriminatory act was justified by business necessity, that is, that the business cannot be conducted in the absence of the discriminatory policy.[6]

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[6] Under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq. (1982), cited as a model for the Human Rights Act, establishment of a prima facie case of housing discrimination shifts the burden to the respondent to state a legitimate, non-discriminatory reason for the practice, if intentional discrimination is alleged, or a business necessity in cases alleging disparate impact of a facially neutral practice. Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984).

HTLV-III Antibody Test

6) In all of the situations described above, what protection does the Act provide to persons known to have or reported to have tested positive on the blood test to identify the presence of antibodies to the AIDS virus, or who are in population categories considered high-risk for the disease?

The human T-lymphotropic virus type III, or HTLV-III, has been determined to be the likely cause of AIDS by the Centers for Disease Control of the U.S. Public Health Service, 34 Morbidity and Mortality Weekly Report No. 1, pp. 2-8 (January 11, 1985). A test has been developed which, with proper use and confirmation, indicates the presence or absence of antibodies to the HTLV-III virus in blood. The presence of such antibodies indicates some exposure to the virus but does not indicate that the subject has AIDS or will develop it in the future, nor whether the subject is capable of transmitting the virus to others through the known methods of exposure (sexual contact, blood transfusions, and sharing of needles). Id. at 5. In addition, some specimens will result in false positive readings due to the test's cross-reactivity to some non-HTLV-III antibodies. Ibid.

As discussed above, discrimination against any individual based upon the result or presumed result of a test for antibodies of the HTLV-III virus would constitute handicap discrimination under the Human Rights Act. Supra at 3. The burden of proof in such cases would be the same as in cases in which the discriminatory actions are based upon a diagnosis of AIDS.

The Human Rights Act does not explicitly proscribe giving the HTLV-III antibody test or other medical tests in connection with employment, education, public accommodations, and housing. However, establishment of an across-the-board policy of requiring the test could have a disparate impact upon the highest-risk group, homosexual men, [7] resulting in unlawful discrimination on the basis of sexual orientation.

The Human Rights Act provides that "any practice which has the effect or consequence of violating any of the provisions of [the act] shall be deemed to be an unlawful discriminatory practice." D.C. Code §1-2532 (1981 ed.). A policy of requiring

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[7] The District of Columbia Commission on Public Health reports that 87% of all AIDS cases in the District are found in homosexual and bisexual men.

testing for HTLV-III antibodies might well have the effect of excluding homosexual men from employment opportunities; a positive result on the test could lead to loss of insurance coverage, loss of future employment, or other discrimination. In that case, a prima facie case of discrimination on the basis of sexual orientation could be established. The burden would then shift to the employer to demonstrate a legitimate, nondiscriminatory reason for the policy, or to prove that the policy is justified by business necessity.

Insurance

7) Does the Act's inclusion of "insurance companies and establishments of insurance policy brokers" in the definition of "place of public accommodation" require health, life, disability insurers to issue policies to applicants

a) who have AIDS,
b) who test positive on the blood test to identify the presence of antibodies to the AIDS virus, or
c) who are in population categories considered high-risk for the disease?

The act defines "place of public accommodation" to include

> "all places included in the meaning of such terms as inns, taverns, road houses, hotels,...restaurants...wholesale and retail stores, and establishments dealing with goods and services of any kind, including, but not limited to...insurance companies and establishments of insurance policy brokers..."

D.C. Code §1-250 (24) (1981 ed.) (emphasis added). This provision has previously been construed by this Office to prohibit discrimination in admission to and enjoyment of places of public accommodation, including insurance company offices, but not in risk assessment or insurability decisions of the industry itself. 3 Op. C.C. 1984 (1978) (Human Rights Act's prohibition on sex discrimination inapplicable to terms of insurance contracts). This conclusion is bolstered by comparison with the Civil Rights Act of 1964, after which the Human Rights Act was patterned. Title II of the Civil Rights Act, 42 U.S.C. §2000a

(b)(3), prohibiting discrimination in public accommodations, was intended "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." Daniel v. Paul, 395 U.S. 298, 308 (1969) (emphasis added). I therefore conclude that the Human Rights Act's prohibition on discrimination in places of public accommodation does not prohibit discrimination against persons with AIDS or others in protected groups in risk assessment or sales of insurance.

Section 271 of the Human Rights Act, D.C. Code §1-2533 (1985 Supp.) prohibits sellers of motor vehicle insurance from cancelling or refusing to issue or renew a policy of motor vehicle insurance "for a discriminatory reason based on race, color, religion, national origin, sex, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, lawful occupation, or location within the geographical area of the District of Columbia of any individual...." That section does not apply to other types of insurance policies, however.

I have addressed your eighth question in answers 6 and 7 above.

Sincerely,

John H. Suda
Acting Corporation Counsel, D.C.

Philadelphia Gay News
Jan. 3-9, 1986

DELAWARE

TRI-STATE NEWS

Del. HRC to Accept AIDS Discrimination Complaints

by John Ward

The acting chair of the Delaware Human Relations Commission (HRC) said that "it is official as far as I am concerned" that AIDS discrimination complaints will be accepted under the state's handicap anti-discrimination law.

Alfred Daniel said that concern about AIDS discrimination was expressed at the November and December meetings of HRC, though no AIDS-related complaints have yet been received. "I am gravely concerned about any discrimination that could occur if it is found out people have the disease," he said.

A spokesperson for the Human Relations Division, a state agency associated with HRC, said that state law defines handicap as a "physical or mental impairment which substantially limits one or more of such person's major life activities" as well as a "record of being regarded as having such an impairment." Handicap discrimination is banned in housing and public accommodations by state law; an executive order by former Governor Pierre du Pont covers state employment and services.

Delaware allows private employers to discriminate against the handicapped. The state Department of Labor (DOL) Anti-Discrimination Unit is not accepting AIDS-related complaints. But the chief appeals referee in DOL's Division of Unemployment Insurance said that if an individual was fired for an involuntary illness that was "collaborated by competent medical evidence," he or she would qualify for unemployment insurance. She added that an individual without AIDS who was fired for AIDS-related reasons would qualify unless misconduct was involved.

Neither the state nor New Castle County nor the city of Wilmington has AIDS policies for their employees; they also have not received any AIDS-related discrimination complaints. The three employers do not protect their lesbian and gay workers from discrimination. Wilmington and New Castle County have laws banning discrimination against employees on the basis of handicaps.

New Castle County Chief Person-

(Continued on page 10)

HRC to Accept AIDS Complaints

(Continued from page 3)

nel Administrator Deborah Gaines said that employees with AIDS would be handled like persons with any other illness. The county's non-discrimination clause includes physical disability but does not define it.

A State Division of Public Health policy that is at least three years old bans discrimination in DPH services on the basis of sexual preference. spokespersons for both the Department of Health and Social Services and the Department of Services to Children, Youth and Their Families said that neither includes sexual orientation or preference in its anti-discrimination clauses for employment or services.

Daniel said that he is also concerned about AIDS discrimination in private employment. He said he asked the state Board of Education to issue AIDS guidelines for employees because "I thought it would better that it come from the state rather than we have pressure [illegible] cases on the [illegible] State Board of Education.

Daniel is concerned that the privacy of school employees could be violated since schools do have medical files for employees health insurance."

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MORBIDITY AND MORTALITY WEEKLY REPORT

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Current Trends

Summary: Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/ Lymphadenopathy-Associated Virus in the Workplace

The information and recommendations contained in this document have been developed with particular emphasis on health-care workers and others in related occupations in which exposure might occur to blood from persons infected with HTLV-III/LAV, the "AIDS virus." Because of public concern about the purported risk of transmission of HTLV-III/LAV by persons providing personal services and those preparing and serving food and beverages, this document also addresses personal-service and food-service workers. Finally, it addresses "other workers"—persons in settings, such as offices, schools, factories, and construction sites, where there is no known risk of AIDS virus transmission.

Because AIDS is a bloodborne, sexually transmitted disease that is not spread by casual contact, this document does *not* recommend routine HTLV-III/LAV antibody screening for the groups addressed. Because AIDS is not transmitted through preparation or serving of food and beverages, these recommendations state that food-service workers known to be infected with AIDS should not be restricted from work unless they have another infection or illness for which such restriction would be warranted.

This document contains detailed recommendations for precautions appropriate to prevent transmission of all bloodborne infectious diseases to people exposed—in the course of their duties—to blood from persons who may be infected with HTLV-III/LAV. They emphasize that health-care workers should take all possible precautions to prevent needlestick injury. The recommendations are based on the well-documented modes of HTLV-III/LAV transmission and incorporate a "worst case" scenario, the hepatitis B model of transmission. Because the hepatitis B virus is also bloodborne and is both hardier and more infectious than HTLV-III/LAV, recommendations that would prevent transmission of hepatitis B will also prevent transmission of AIDS.

Formulation of specific recommendations for health-care workers who perform invasive procedures is in progress.

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Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/ Lymphadenopathy-Associated Virus in the Workplace

Persons at increased risk of acquiring infection with human T-lymphotropic virus type III/lymphadenopathy-associated virus (HTLV-III/LAV), the virus that causes acquired immunodeficiency syndrome (AIDS), include homosexual and bisexual men, intravenous (IV) drug abusers, persons transfused with contaminated blood or blood products, heterosexual contacts of persons with HTLV-III/LAV infection, and children born to infected mothers. HTLV-III/LAV is transmitted through sexual contact, parenteral exposure to infected blood or blood components, and perinatal transmission from mother to neonate. HTLV-III/LAV has been isolated from blood, semen, saliva, tears, breast milk, and urine and is likely to be isolated from some other body fluids, secretions, and excretions, but epidemiologic evidence has implicated only blood and semen in transmission. Studies of nonsexual household contacts of AIDS patients indicate that casual contact with saliva and tears does not result in transmission of infection. Spread of infection to household contacts of infected persons has not been detected when the household contacts have not been sex partners or have not been infants of infected mothers. The kind of nonsexual person-to-person contact that generally occurs among workers and clients or consumers in the workplace does not pose a risk for transmission of HTLV-III/LAV.

As in the development of any such recommendations, the paramount consideration is the protection of the public's health. The following recommendations have been developed for all workers, particularly workers in occupations in which exposure might occur to blood from individuals infected with HTLV-III/LAV. These recommendations reinforce and supplement the specific recommendations that were published earlier for clinical and laboratory staffs (*1*) and for dental-care personnel and persons performing necropsies and morticians' services (*2*). Because of public concern about the purported risk of transmission of HTLV-III/LAV by persons providing personal services and by food and beverages, these recommendations contain information and recommendations for personal-service and food-service workers. Finally, these recommendations address workplaces in general where there is no known risk of transmission of HTLV-III/LAV (e.g., offices, schools, factories, construction sites). Formulation of specific recommendations for health-care workers (HCWs) who perform invasive procedures (e.g., surgeons, dentists) is in progress. Separate recommendations are also being developed to prevent HTLV-III/LAV transmission in prisons, other correctional facilities, and institutions housing individuals who may exhibit uncontrollable behavior (e.g., custodial institutions) and in the perinatal setting. In addition, separate recommendations have already been developed for children in schools and day-care centers (*3*).

HTLV-III/LAV-infected individuals include those with AIDS (*4*); those diagnosed by their physician(s) as having other illnesses due to infection with HTLV-III/LAV; and those who have virologic or serologic evidence of infection with HTLV-III/LAV but who are not ill.

These recommendations are based on the well-documented modes of HTLV-III/LAV transmission identified in epidemiologic studies and on comparison with the hepatitis B experience. Other recommendations are based on the hepatitis B model of transmission.

COMPARISON WITH THE HEPATITIS B VIRUS EXPERIENCE

The epidemiology of HTLV-III/LAV infection is similar to that of hepatitis B virus (HBV) infection, and much that has been learned over the last 15 years related to the risk of acquiring hepatitis B in the workplace can be applied to understanding the risk of HTLV-III/LAV transmission in the health-care and other occupational settings. Both viruses are transmitted through

HTLV-III/LAV – Continued

sexual contact, parenteral exposure to contaminated blood or blood products, and perinatal transmission from infected mothers to their offspring. Thus, some of the same major groups at high risk for HBV infection (e.g., homosexual men, IV drug abusers, persons with hemophilia, infants born to infected mothers) are also the groups at highest risk for HTLV-III/LAV infection. Neither HBV nor HTLV-III/LAV has been shown to be transmitted by casual contact in the workplace, contaminated food or water, or airborne or fecal-oral routes (*5*).

HBV infection is an occupational risk for HCWs, but this risk is related to degree of contact with blood or contaminated needles. HCWs who do not have contact with blood or needles contaminated with blood are not at risk for acquiring HBV infection in the workplace (*6-8*).

In the health-care setting, HBV transmission has not been documented between hospitalized patients, except in hemodialysis units, where blood contamination of the environment has been extensive or where HBV-positive blood from one patient has been transferred to another patient through contamination of instruments. Evidence of HBV transmission from HCWs to patients has been rare and limited to situations in which the HCWs exhibited high concentrations of virus in their blood (at least 100,000,000 infectious virus particles per ml of serum), and the HCWs sustained a puncture wound while performing traumatic procedures on patients or had exudative or weeping lesions that allowed virus to contaminate instruments or open wounds of patients (*9-11*).

Current evidence indicates that, despite epidemiologic similarities of HBV and HTLV-III/LAV infection, the risk for HBV transmission in health-care settings far exceeds that for HTLV-III/LAV transmission. The risk of acquiring HBV infection following a needlestick from an HBV carrier ranges from 6% to 30% (*12,13*), far in excess of the risk of HTLV-III/LAV infection following a needlestick involving a source patient infected with HTLV-III/LAV, which is less than 1%. In addition, all HCWs who have been shown to transmit HBV infection in health-care settings have belonged to the subset of chronic HBV carriers who, when tested, have exhibited evidence of exceptionally high concentrations of virus (at least 100,000,000 infectious virus particles per ml) in their blood. Chronic carriers who have substantially lower concentrations of virus in their blood have not been implicated in transmission in the health-care setting (*9-11,14*). The HBV model thus represents a "worst case" condition in regard to transmission in health-care and other related settings. Therefore, recommendations for the control of HBV infection should, if followed, also effectively prevent spread of HTLV-III/LAV. Whether additional measures are indicated for those HCWs who perform invasive procedures will be addressed in the recommendations currently being developed.

Routine screening of all patients or HCWs for evidence of HBV infection has never been recommended. Control of HBV transmission in the health-care setting has emphasized the implementation of recommendations for the appropriate handling of blood, other body fluids, and items soiled with blood or other body fluids.

TRANSMISSION FROM PATIENTS TO HEALTH-CARE WORKERS

HCWs include, but are not limited to, nurses, physicians, dentists and other dental workers, optometrists, podiatrists, chiropractors, laboratory and blood bank technologists and technicians, phlebotomists, dialysis personnel, paramedics, emergency medical technicians, medical examiners, morticians, housekeepers, laundry workers, and others whose work involves contact with patients, their blood or other body fluids, or corpses.

Recommendations for HCWs emphasize precautions appropriate for preventing transmission of bloodborne infectious diseases, including HTLV-III/LAV and HBV infections. Thus, these precautions should be enforced routinely, as should other standard infection-control precautions, regardless of whether HCWs or patients are known to be infected with HTLV-III/LAV or HBV. In addition to being informed of these precautions, all HCWs, including students

HTLV-III/LAV – Continued

and housestaff, should be educated regarding the epidemiology, modes of transmission, and prevention of HTLV-III/LAV infection.

Risk of HCWs acquiring HTLV-III/LAV in the workplace. Using the HBV model, the highest risk for transmission of HTLV-III/LAV in the workplace would involve parenteral exposure to a needle or other sharp instrument contaminated with blood of an infected patient. The risk to HCWs of acquiring HTLV-III/LAV infection in the workplace has been evaluated in several studies. In five separate studies, a total of 1,498 HCWs have been tested for antibody to HTLV-III/LAV. In these studies, 666 (44.5%) of the HCWs had direct parenteral (needlestick or cut) or mucous membrane exposure to patients with AIDS or HTLV-III/LAV infection. Most of these exposures were to blood rather than to other body fluids. None of the HCWs whose initial serologic tests were negative developed subsequent evidence of HTLV-III/LAV infection following their exposures. Twenty-six HCWs in these five studies were seropositive when first tested; all but three of these persons belonged to groups recognized to be at increased risk for AIDS (*15*). Since one was tested anonymously, epidemiologic information was available on only two of these three seropositive HCWs. Although these two HCWs were reported as probable occupationally related HTLV-III/LAV infection (*15,16*), neither had a preexposure nor an early postexposure serum sample available to help determine the onset of infection. One case reported from England describes a nurse who seroconverted following an accidental parenteral exposure to a needle contaminated with blood from an AIDS patient (*17*).

In spite of the extremely low risk of transmission of HTLV-III/LAV infection, even when needlestick injuries occur, more emphasis must be given to precautions targeted to prevent needlestick injuries in HCWs caring for any patient, since such injuries continue to occur even during the care of patients who are known to be infected with HTLV-III/LAV.

Precautions to prevent acquisition of HTLV-III/LAV infection by HCWs in the workplace. These precautions represent prudent practices that apply to preventing transmission of HTLV-III/LAV and other bloodborne infections and should be used routinely (*18*).

1. Sharp items (needles, scalpel blades, and other sharp instruments) should be considered as potentially infective and be handled with extraordinary care to prevent accidental injuries.
2. Disposable syringes and needles, scalpel blades, and other sharp items should be placed into puncture-resistant containers located as close as practical to the area in which they were used. To prevent needlestick injuries, needles should not be recapped, purposefully bent, broken, removed from disposable syringes, or otherwise manipulated by hand.
3. When the possibility of exposure to blood or other body fluids exists, routinely recommended precautions should be followed. The anticipated exposure may require gloves alone, as in handling items soiled with blood or equipment contaminated with blood or other body fluids, or may also require gowns, masks, and eye-coverings when performing procedures involving more extensive contact with blood or potentially infective body fluids, as in some dental or endoscopic procedures or postmortem examinations. Hands should be washed thoroughly and immediately if they accidentally become contaminated with blood.
4. To minimize the need for emergency mouth-to-mouth resuscitation, mouth pieces, resuscitation bags, or other ventilation devices should be strategically located and available for use in areas where the need for resuscitation is predictable.
5. Pregnant HCWs are not known to be at greater risk of contracting HTLV-III/LAV infections than HCWs who are not pregnant; however, if a HCW develops HTLV-III/LAV infection during pregnancy, the infant is at increased risk of infection resulting from

HTLV-III/LAV — Continued

perinatal transmission. Because of this risk, pregnant HCWs should be especially familiar with precautions for the preventing HTLV-III/LAV transmission (*19*).

Precautions for HCWs during home care of persons infected with HTLV-III/LAV. Persons infected with HTLV-III/LAV can be safely cared for in home environments. Studies of family members of patients infected with HTLV-III/LAV have found no evidence of HTLV-III/LAV transmission to adults who were not sexual contacts of the infected patients or to children who were not at risk for perinatal transmission (*3*). HCWs providing home care face the same risk of transmission of infection as HCWs in hospitals and other health-care settings, especially if there are needlesticks or other parenteral or mucous membrane exposures to blood or other body fluids.

When providing health care service in the home to persons infected with HTLV-III/LAV, measures similar to those used in hospitals are appropriate. As in the hospital, needles should not be recapped, purposefully bent, broken, removed from disposable syringes, or otherwise manipulated by hand. Needles and other sharp items should be placed into puncture-resistant containers and disposed of in accordance with local regulations for solid waste. Blood and other body fluids can be flushed down the toilet. Other items for disposal that are contaminated with blood or other body fluids that cannot be flushed down the toilet should be wrapped securely in a plastic bag that is impervious and sturdy (not easily penetrated). It should be placed in a second bag before being discarded in a manner consistent with local regulations for solid waste disposal. Spills of blood or other body fluids should be cleaned with soap and water or a household detergent. As in the hospital, individuals cleaning up such spills should wear disposable gloves. A disinfectant solution or a freshly prepared solution of sodium hypochlorite (household bleach; see below) should be used to wipe the area after cleaning.

Precautions for providers of prehospital emergency health care. Providers of prehospital emergency health care include the following: paramedics, emergency medical technicians, law enforcement personnel, firefighters, lifeguards, and others whose job might require them to provide first-response medical care. The risk of transmission of infection, including HTLV-III/LAV infection, from infected persons to providers of prehospital emergency health care should be no higher than that for HCWs providing emergency care in the hospital if appropriate precautions are taken to prevent exposure to blood or other body fluids.

Providers of prehospital emergency health care should follow the precautions outlined above for other HCWs. No transmission of HBV infection during mouth-to-mouth resuscitation has been documented. However, because of the theoretical risk of salivary transmission of HTLV-III/LAV during mouth-to-mouth resuscitation, special attention should be given to the use of disposable airway equipment or resuscitation bags and the wearing of gloves when in contact with blood or other body fluids. Resuscitation equipment and devices known or suspected to be contaminated with blood or other body fluids should be used once and disposed of or be thoroughly cleaned and disinfected after each use.

Management of parenteral and mucous membrane exposures of HCWs. If a HCW has a parenteral (e.g., needlestick or cut) or mucous membrane (e.g., splash to the eye or mouth) exposure to blood or other body fluids, the source patient should be assessed clinically and epidemiologically to determine the likelihood of HTLV-III/LAV infection. If the assessment suggests that infection may exist, the patient should be informed of the incident and requested to consent to serologic testing for evidence of HTLV-III/LAV infection. If the source patient has AIDS or other evidence of HTLV-III/LAV infection, declines testing, or has a positive test, the HCW should be evaluated clinically and serologically for evidence of HTLV-III/LAV infection as soon as possible after the exposure, and, if seronegative, retested after 6 weeks and on a periodic basis thereafter (e.g., 3, 6, and 12 months following exposure) to determine if

HTLV-III/LAV — Continued

emergency cases and patients with short lengths of stay, and additional tests to determine whether a positive test was a true or false positive would be required in populations with a low prevalence of infection. However, this recommendation is based only on considerations of occupational risks and should not be construed as a recommendation against other uses of the serologic test, such as for diagnosis or to facilitate medical management of patients. Since the experience with infected patients varies substantially among hospitals (75% of all AIDS cases have been reported by only 280 of the more than 6,000 acute-care hospitals in the United States), some hospitals in certain geographic areas may deem it appropriate to initiate serologic testing of patients.

TRANSMISSION FROM HEALTH-CARE WORKERS TO PATIENTS

Risk of transmission of HTLV-III/LAV infection from HCWs to patients. Although there is no evidence that HCWs infected with HTLV-III/LAV have transmitted infection to patients, a risk of transmission of HTLV-III/LAV infection from HCWs to patients would exist in situations where there is both (1) a high degree of trauma to the patient that would provide a portal of entry for the virus (e.g., during invasive procedures) and (2) access of blood or serous fluid from the infected HCW to the open tissue of a patient, as could occur if the HCW sustains a needlestick or scalpel injury during an invasive procedure. HCWs known to be infected with HTLV-III/LAV who do not perform invasive procedures need not be restricted from work unless they have evidence of other infection or illness for which any HCW should be restricted. Whether additional restrictions are indicated for HCWs who perform invasive procedures is currently being considered.

Precautions to prevent transmission of HTLV-III/LAV infection from HCWs to patients. These precautions apply to all HCWs, regardless of whether they perform invasive procedures. (1) All HCWs should wear gloves for direct contact with mucous membranes or nonintact skin of all patients and (2) HCWs who have exudative lesions or weeping dermatitis should refrain from all direct patient care and from handling patient-care equipment until the condition resolves.

Management of parenteral and mucous membrane exposures of patients. If a patient has a parenteral or mucous membrane exposure to blood or other body fluids of a HCW, the patient should be informed of the incident and the same procedure outlined above for exposures of HCWs to patients should be followed for both the source HCW and the potentially exposed patient. Management of this type of exposure will be addressed in more detail in the recommendations for HCWs who perform invasive procedures.

Serologic testing of HCWs. Routine serologic testing of HCWs who do not perform invasive procedures (including providers of home and prehospital emergency care) is not recommended to prevent transmission of HTLV-III/LAV infection. The risk of transmission is extremely low and can be further minimized when routinely recommended infection-control precautions are followed. However, serologic testing should be available to HCWs who may wish to know their HTLV-III/LAV infection status. Whether indications exist for serologic testing of HCWs who perform invasive procedures is currently being considered.

Risk of occupational acquisition of other infectious diseases by HCWs infected with HTLV-III/LAV. HCWs who are known to be infected with HTLV-III/LAV and who have defective immune systems are at increased risk of acquiring or experiencing serious complications of other infectious diseases. Of particular concern is the risk of severe infection following exposure to patients with infectious diseases that are easily transmitted if appropriate precautions are not taken (e.g., tuberculosis). HCWs infected with HTLV-III/LAV should be counseled about the potential risk associated with taking care of patients with transmissible infections and should continue to follow existing recommendations for infection control to minimize

HTLV-III/LAV - Continued

their risk of exposure to other infectious agents (*18,19*). The HCWs' personal physician(s), in conjunction with their institutions' personnel health services or medical directors, should determine on an individual basis whether the infected HCWs can adequately and safely perform patient-care duties and suggest changes in work assignments, if indicated. In making this determination, recommendations of the Immunization Practices Advisory Committee and institutional policies concerning requirements for vaccinating HCWs with live-virus vaccines should also be considered.

STERILIZATION, DISINFECTION, HOUSEKEEPING, AND WASTE DISPOSAL TO PREVENT TRANSMISSION OF HTLV-III/LAV

Sterilization and disinfection procedures currently recommended for use (*22,23*) in health-care and dental facilities are adequate to sterilize or disinfect instruments, devices, or other items contaminated with the blood or other body fluids from individuals infected with HTLV-III/LAV. Instruments or other nondisposable items that enter normally sterile tissue or the vascular system or through which blood flows should be sterilized before reuse. Surgical instruments used on all patients should be decontaminated after use rather than just rinsed with water. Decontamination can be accomplished by machine or by hand cleaning by trained personnel wearing appropriate protective attire (*24*) and using appropriate chemical germicides. Instruments or other nondisposable items that touch intact mucous membranes should receive high-level disinfection.

Several liquid chemical germicides commonly used in laboratories and health-care facilities have been shown to kill HTLV-III/LAV at concentrations much lower than are used in practice (*25*). When decontaminating instruments or medical devices, chemical germicides that are registered with and approved by the U.S. Environmental Protection Agency (EPA) as "sterilants" can be used either for sterilization or for high-level disinfection depending on contact time; germicides that are approved for use as "hospital disinfectants" and are mycobactericidal when used at appropriate dilutions can also be used for high-level disinfection of devices and instruments. Germicides that are mycobactericidal are preferred because mycobacteria represent one of the most resistant groups of microorganisms; therefore, germicides that are effective against mycobacteria are also effective against other bacterial and viral pathogens. When chemical germicides are used, instruments or devices to be sterilized or disinfected should be thoroughly cleaned before exposure to the germicide, and the manufacturer's instructions for use of the germicide should be followed.

Laundry and dishwashing cycles commonly used in hospitals are adequate to decontaminate linens, dishes, glassware, and utensils. When cleaning environmental surfaces, housekeeping procedures commonly used in hospitals are adequate; surfaces exposed to blood and body fluids should be cleaned with a detergent followed by decontamination using an EPA-approved hospital disinfectant that is mycobactericidal. Individuals cleaning up such spills should wear disposable gloves. Information on specific label claims of commercial germicides can be obtained by writing to the Disinfectants Branch, Office of Pesticides, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

In addition to hospital disinfectants, a freshly prepared solution of sodium hypochlorite (household bleach) is an inexpensive and very effective germicide (*25*). Concentrations ranging from 5,000 ppm (a 1:10 dilution of household bleach) to 500 ppm (a 1:100 dilution) sodium hypochlorite are effective, depending on the amount of organic material (e.g., blood, mucus, etc.) present on the surface to be cleaned and disinfected.

Sharp items should be considered as potentially infective and should be handled and disposed of with extraordinary care to prevent accidental injuries. Other potentially infective waste should be contained and transported in clearly identified impervious plastic bags. If the outside of the bag is contaminated with blood or other body fluids, a second outer bag should be used. Recommended practices for disposal of infective waste (*23*) are adequate for disposal of waste contaminated by HTLV-III/LAV. Blood and other body fluids may be carefully poured down a drain connected to a sanitary sewer.

HTLV-III/LAV - Continued

CONSIDERATIONS RELEVANT TO OTHER WORKERS

Personal-service workers (PSWs). PSWs are defined as individuals whose occupations involve close personal contact with clients (e.g., hairdressers, barbers, estheticians, cosmetologists, manicurists, pedicurists, massage therapists). PSWs whose services (tattooing, ear piercing, acupuncture, etc.) require needles or other instruments that penetrate the skin should follow precautions indicated for HCWs. Although there is no evidence of transmission of HTLV-III/LAV from clients to PSWs, from PSWs to clients, or between clients of PSWs, a risk of transmission would exist from PSWs to clients and vice versa in situations where there is both (1) trauma to one of the individuals that would provide a portal of entry for the virus and (2) access of blood or serous fluid from one infected person to the open tissue of the other, as could occur if either sustained a cut. A risk of transmission from client to client exists when instruments contaminated with blood are not sterilized or disinfected between clients. However, HBV transmission has been documented only rarely in acupuncture, ear piercing, and tattoo establishments and never in other personal-service settings, indicating that any risk for HTLV-III/LAV transmission in personal-service settings must be extremely low.

All PSWs should be educated about transmission of bloodborne infections, including HTLV-III/LAV and HBV. Such education should emphasize principles of good hygiene, antisepsis, and disinfection. This education can be accomplished by national or state professional organizations, with assistance from state and local health departments, using lectures at meetings or self-instructional materials. Licensure requirements should include evidence of such education. Instruments that are intended to penetrate the skin (e.g., tattooing and acupuncture needles, ear piercing devices) should be used once and disposed of or be thoroughly cleaned and sterilized after each use using procedures recommended for use in health-care institutions. Instruments not intended to penetrate the skin but which may become contaminated with blood (e.g., razors), should be used for only one client and be disposed of or thoroughly cleaned and disinfected after use using procedures recommended for use in health-care institutions. Any PSW with exudative lesions or weeping dermatitis, regardless of HTLV-III/LAV infection status, should refrain from direct contact with clients until the condition resolves. PSWs known to be infected with HTLV-III/LAV need not be restricted from work unless they have evidence of other infections or illnesses for which any PSW should also be restricted.

Routine serologic testing of PSWs for antibody to HTLV-III/LAV is not recommended to prevent transmission from PSWs to clients.

Food-service workers (FSWs). FSWs are defined as individuals whose occupations involve the preparation or serving of food or beverages (e.g., cooks, caterers, servers, waiters, bartenders, airline attendants). All epidemiologic and laboratory evidence indicates that bloodborne and sexually transmitted infections are not transmitted during the preparation or serving of food or beverages, and no instances of HBV or HTLV-III/LAV transmission have been documented in this setting.

All FSWs should follow recommended standards and practices of good personal hygiene and food sanitation (*26*). All FSWs should exercise care to avoid injury to hands when preparing food. Should such an injury occur, both aesthetic and sanitary considerations would dictate that food contaminated with blood be discarded. FSWs known to be infected with HTLV-III/LAV need not be restricted from work unless they have evidence of other infection or illness for which any FSW should also be restricted.

HTLV-III/LAV – Continued

Routine serologic testing of FSWs for antibody to HTLV-III/LAV is not recommended to prevent disease transmission from FSWs to consumers.

Other workers sharing the same work environment. No known risk of transmission to co-workers, clients, or consumers exists from HTLV-III/LAV-infected workers in other settings (e.g., offices, schools, factories, construction sites). This infection is spread by sexual contact with infected persons, injection of contaminated blood or blood products, and by perinatal transmission. Workers known to be infected with HTLV-III/LAV should not be restricted from work solely based on this finding. Moreover, they should not be restricted from using telephones, office equipment, toilets, showers, eating facilities, and water fountains. Equipment contaminated with blood or other body fluids of any worker, regardless of HTLV-III/LAV infection status, should be cleaned with soap and water or a detergent. A disinfectant solution or a fresh solution of sodium hypochlorite (household bleach, see above) should be used to wipe the area after cleaning.

OTHER ISSUES IN THE WORKPLACE

The information and recommendations contained in this document do not address all the potential issues that may have to be considered when making specific employment decisions for persons with HTLV-III/LAV infection. The diagnosis of HTLV-III/LAV infection may evoke unwarranted fear and suspicion in some co-workers. Other issues that may be considered include the need for confidentiality, applicable federal, state, or local laws governing occupational safety and health, civil rights of employees, workers' compensation laws, provisions of collective bargaining agreements, confidentiality of medical records, informed consent, employee and patient privacy rights, and employee right-to-know statutes.

DEVELOPMENT OF THESE RECOMMENDATIONS

The information and recommendations contained in these recommendations were developed and compiled by CDC and other PHS agencies in consultation with individuals representing various organizations. The following organizations were represented: Association of State and Territorial Health Officials, Conference of State and Territorial Epidemiologists, Association of State and Territorial Public Health Laboratory Directors, National Association of County Health Officials, American Hospital Association, United State Conference of Local Health Officers, Association for Practitioners in Infection Control, Society of Hospital Epidemiologists of America, American Dental Association, American Medical Association, American Nurses' Association, American Association of Medical Colleges, American Association of Dental Schools, National Institutes of Health, Food and Drug Administration, Food Research Institute, National Restaurant Association, National Hairdressers and Cosmetologists Association, National Gay Task Force, National Funeral Directors and Morticians Association, American Association of Physicians for Human Rights, and National Association of Emergency Medical Technicians. The consultants also included a labor union representative, an attorney, a corporate medical director, and a pathologist. However, these recommendations may not reflect the views of individual consultants or the organizations they represented.

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HTLV-III/LAV – Continued

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STATE OF MICHIGAN

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March 18, 1986

The Honorable James J. Blanchard
Governor
State of Michigan
State Capitol Building
Lansing, Michigan 48909

Dear Governor Blanchard:

I am transmitting for your consideration the initial report on Acquired Immune Deficiency Syndrome (AIDS) in Michigan.

Your October 21, 1985, letter directed the Public Health Advisory Council to review the current situation and make recommendations for a comprehensive state policy concerning AIDS. In response, the council created an Expert Committee on AIDS, comprised of 43 leaders in the fields of medicine and law as well as representatives of public agencies, advocacy organizations, and associations of health professionals. The Expert Committee created four subcommittees and began deliberations in December. Acting on the findings and recommendations of the Expert Committee, the Public Health Advisory Council approved this report and its recommendations on March 17.

The recommendations contained in the report reflect the consensus of a wide variety of Michigan experts about the best means to protect the public health from the spread of AIDS. Throughout its deliberations, the committee was fully cognizant of the level of concern of Michigan citizens about this syndrome. The members of the committees also recognized the need to assure that appropriate systems are available in Michigan for the care of people with AIDS.

Outstanding leadership and considerable resources have been provided by the private sector for combating AIDS in Michigan, particularly by organizations representing groups at highest risk. While private commitment continues, private resources are being strained. It is clear that additional support from both the state and federal governments is urgently needed to react to this new epidemic.

As you have said, we must guarantee that state and local agencies are doing all they can to protect the health of our citizens through a strong, comprehensive policy regarding AIDS. This report recommends policies to ease public anxiety about AIDS, to motivate individuals to change high-risk behavior, and to meet the medical and support needs of persons with AIDS.

16. Problem Statement: There is need for delineation of state policy relating to employee-employer relationships, particularly as it relates to state government.

Analysis: The Michigan Handicappers' Civil Rights Act, enacted in 1976, protects handicapped persons from discrimination in employment, housing, public accommodations, public service, and education, unless it can be demonstrated that such accommodation imposes undue hardship. All employers of four or more persons, including state and local governments, are covered by the act.

The act defines handicap as a "determinable physical characteristic . . . of an individual . . . which may result from disease . . .." The Department of Civil Rights, which administers the act, has stated that it will accept and process complaints from persons alleging unlawful discrimination based on AIDS, since AIDS appears to be within the statutory definition of a handicap. It is likely that alleged discrimination based upon ARC and HTLV-III antibody positivity would also be subject to the Handicappers' Civil Rights Act.

In addition to the fear of discrimination, concerns have been expressed by state employees regarding health and life insurance benefits. The Michigan Department of Civil Service recently reviewed state employee health benefits and life insurance and determined that AIDS-related illnesses and medical treatment are covered by both the state's health and life insurance policies.

Recommendation 16:

> The Michigan Department of Civil Rights (MDCR) should enforce the provisions of the state Handicappers' Civil Rights Act to ensure that people with AIDS, ARC, or HTLV-III antibody positivity are protected against discrimination in employment, housing, public accommodations, public service, and education. The MDCR should publicize its policy regarding the rights of persons with AIDS, ARC, or HTLV-III antibody positivity.

17. Problem Statement: There is need for state contractors who provide care in settings such as foster care homes, halfway houses, and substance abuse clinics to be provided with AIDS information and policy direction.

Analysis: A substantial number of caregivers provide direct services, lodging, and other care under contract with state agencies such as the Department of Social Services (foster care homes), the Department of Mental Health (community mental health clinics), and the Department of Public Health (substance abuse clinics). Concerns for themselves, their employees, and other patients or residents must be addressed through informational materials developed by the appropriate contracting agency with the assistance of the MDPH.

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microorganisms circulated from a focus of infection.

i., mixed. Infection caused by two or more organisms.

i., pyogenic. Infection resulting from pus-forming organisms.

i., secondary. Infection caused by a different organism than the one causing the primary infection.

i., simple. Infection due to a single species of organism.

i., subacute. An infection intermediate between acute and chronic.

i., subclinical. Infection that is immunologically confirmed but does not show clinical symptoms in the individual.

i., terminal. Infection occurring in the late stage of a disease. Generally acute and septic, usually causing death.

infectious (in-fĕk'shŭs) [ME. *infecten*, infect] 1. Capable of being transmitted with or without contact. 2. Pert. to a disease due to a microorganism. 3. Producing infection.

infectious disease. Any disease caused by growth of pathogenic microorganisms in the body. May or may not be contagious. SEE *quarantine*; names of infectious diseases.

infecundity (in-fĕ-kŭn'dĭ-tē) [L. *infecunditas*, sterility]. Barrenness; sterility in women.

inferior (in-fē'rĭ-or) [L. *inferus*, below]. 1. Beneath; lower. 2. [NA] Used medically in reference to the undersurface of an organ or indicating a structure below another structure.

inferiority complex. In psychology, a repressed state of mind in which one feels himself inferior to others. Such a group of ideas may be manifested by the assumption of superiority, often resulting in over-compensation. Opposite of superiority complex. SEE *complex*.

infertility. Inability or diminished ability to produce offspring; unproductivity. Condition may be present in either or both sexual partners and is usually reversible. Diagnostic investigation includes special tests of both partners as well as a complete physical examination. Some factors responsible for infertility are immature or abnormal reproductive systems, anomalies of other organs in that vicinity, endocrine dysfunction, and emotional problems.

i., primary. Infertility in which pregnancy has never occurred.

i., secondary. Infertility in which there have been one or more pregnancies prior to the present condition of infertility.

infest [L. *infestare*, to attack]. To overrun to a harmful extent. Said esp. of parasites.

infestation. The harboring of animal parasites, esp. macroscopic forms such as ectoparasites and arthropod endoparasites.

infibulation (in-fĭb-ū-lā'shŭn) [L. *in*, in, + *fibula*, clasp]. The process of fastening, as in joining the lips of wounds by clasps.

infiltrate (in-fĭl'trāt, in'fĭl-trāt) [° + *filtrare*, to strain through]. 1. To pass into or through a substance or a space. 2. The material that has infiltrated.

infiltration (in"fĭl-trā'shŭn). The process of a substance passing into and being deposited within the substance of a cell, tissue, or organ.

Ex: infiltration of a tissue or organ with blood corpuscles, or of a cell by fatty particles. Infiltration must not be confused with degeneration; in the latter condition the foreign substances are from changes within the cell.

i., amyloid. Infiltration of tissue or viscera with a glycoprotein.

i., anesthesia. Injection of an anesthetic solution directly into the tissue. SEE *anesthesia*.

i., calcareous. Deposits of calcium or magnesium salts within a tissue.

i., cellular. Infiltration of cells, esp. blood cells, into tissues; invasion by cells of malignant tumors into adjacent tissue.

i., fatty. Deposit of fat in the tissues, or oil or fat globules in the cells.

i., glycogenic. Glycogen deposit in cells.

i., lymphocytic. Infiltration of tissue by lymphocytes.

i., pigmentary. Infiltration of pigments.

i., purulent. Pus cells in a tissue.

i., serous. Infiltration with diluted lymph.

i., urinous. Infiltration with urine.

i., waxy. Amyloid degeneration.

infinite distance. 1. A distance without limits. 2. In vision, light rays coming from a point of any distance beyond 20 feet (6.1 meters) are practically parallel and accommodation is unnecessary.

infirm [L. *infirmis*]. Weak or feeble, esp. from old age or disease.

infirmary [L. *infirmarium*]. A small hospital; a place for the care of sick or infirm persons.

infirmity. 1. Weakness. 2. A sickness or illness.

inflammation [L. *inflammare*, to flame within]. Tissue reaction to injury. The succession of changes which occur in living tissue when it is injured. The inflamed area undergoes continuous change as the body repair processes start to heal and replace injured tissue. Inflammation is a conservative process modified by whatever produces the reaction, but it should not be confused with infection; the two are relatively different conditions, although one may arise from the other. SEE *infection*.

flicted with leprosy.

lepido- [Gr. *lepis*, scale]. Combining form referring to flakes or scales.

Lepidoptera (lĕp"i-dŏp'tĕr-ă) [" + *pteron*, feather, wing]. An order of the class Insecta which includes the butterflies, moths, and skippers. Characterized by scaly wings, sucking mouth parts, and complete metamorphosis.

lepidosis (lĕp"i-dō'sis) [" + *osis*, condition]. Any scaly or desquamating eruption such as pityriasis.

lepothrix (lĕp'ō-thriks) [" + *thrix*, hair]. Condition in which the shaft of the hair is encased in hardened, scaly, sebaceous matter.

lepra (lĕp'ră) [Gr. *lepra*, leprosy]. A term formerly used for leprosy. Now used to indicate a reaction which occurs in leprosy patients consisting of aggravation of lesions accompanied by fever and malaise. This can occur in any form of leprosy and may be prolonged.

l. alba. Skin is anesthetic and white, and different forms of paralysis follow.

l. anesthetica. Leprosy with anesthetic areas on body.

l. Arabum. True or nodular leprosy.

l. maculosa. Form of lepra with pigmented cutaneous areas.

l. mutilans. Final stage of true leprosy.

l. nervorum. Maculo-anesthetic leprosy.

leprid (lĕp'rid) [Gr. *lepra*, leprosy, + *eidos*, form]. Leprous cutaneous lesion.

leprology (lĕp-rŏl'ŏ-jē) [" + *logos*, study]. The study of leprosy and methods of treating it.

leproma (lĕp-rō'mă) [" + *oma*, tumor]. A cutaneous nodule or tubercle characteristic of leprosy.

lepromin. A substance prepared from lepromatous nodules of leprosy.

lepromin skin test. Test in which lepromin is introduced intradermally to attempt to diagnose leprosy. The test is positive in individuals with tuberculoid leprosy and is negative in individuals with the lepromatous form.

leprosarium. An institution for the care of lepers.

leprosy (lĕp'rō-sē) [Gr. *lepros*, scaly]. A chronic communicable disease caused by the acid-fast Mycobacterium leprae. It may occur in various clinical forms. The two principal forms are lepromatous and tuberculoid.

The *lepromatous* form is characterized by skin lesions and symmetrical involvement of peripheral nerves with anesthesia, muscle weakness, and paralysis. In this form, the lesions are limited to the cooler portions of the body such as skin, upper respiratory tract, and testes. In *tuberculoid* leprosy, which is usually benign, the nerve lesions are asymmetrical and skin anesthesia is an early occurrence. Visceral involvement is not seen.

Lepromatous leprosy is much more contagious than the tuberculoid form. In the latter, Mycobacterium leprae are found only rarely except during reactions.

Between the two major forms are *borderline* and *indeterminate* leprosy. In the borderline group, the clinical and bacteriological features represent a combination of the two principal types. In the indeterminate group, there are fewer skin lesions and bacteria are much less abundant in the lesions. In many respects, this infection resembles tuberculosis and for many years was regarded as incurable, a conclusion no longer considered true. SYN: *Hansen's disease.*

ETIOL: Caused by Mycobacterium leprae. May occur at practically any age.

INCUBATION: From 1 to 30 years.

SYM: Onset very gradual. The first signs of infection are usually skin changes, but they may be so nonspecific and so slow to progress as to go unrecognized for years.

DIAG: Biopsy of a suspected skin lesion. The bacilli may not be present in tuberculoid lesions. In vitro tests of the immunologic response can be accomplished by the lymphocyte transformation test and the leukocyte migration inhibition test. SEE *lepromin skin test.*

COMPLICATIONS: Bacterial infections of skin, ulcers, traumatic amputation of fingers due to anesthesia. Tuberculosis is a much more common complication in untreated cases of lepromatous leprosy than in the tuberculoid form. Amyloidosis may be the cause of death in advanced cases.

PROG: With proper therapy the outlook for recovery is good.

TREATMENT: Dapsone (4,4'-diaminodiphenyl sulfone, DDS) is the form of sulfone most commonly used. If dapsone is not tolerated sulfoxone may be substituted. Rifampin is experimentally used in patients with sulfone-resistant bacilli. The management of patients with leprosy is complex and may require expert consultation. Such assistance may be obtained by contacting physicians at the U.S. Public Health Service Hospital, Carville, Louisiana.

Segregation of patients in colonies or hospitals until bacterial tests have been negative for six months is not the preferred or effective method of isolating patients. Ambulatory treatment of patients at general clinics has been found to be much more effective. Because they are more susceptible to this disease than adults, children should be removed from contact with leprosy patients.

MAINE=
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TESTIMONY OF THE

MAINE HUMAN RIGHTS COMMISSION

ON LD 2063

AN ACT TO PROTECT THE PUBLIC HEALTH IN RELATION TO ACQUIRED IMMUNE DEFICIENCY SYNDROME

CHAIR GAUVREAU, CHAIR NELSON, MEMBERS OF THE COMMITTEE ON HUMAN RESOURCES, FOLLOWING IS THE TESTIMONY OF THE MAINE HUMAN RIGHTS COMMISSION, PREPARED BY PATRICIA E. RYAN, WHO IS IN BALTIMORE ON COMMISSION BUSINESS. I AM JOHN E. CARNES, COMMISSION COUNSEL.

THIS TESTIMONY OF THE MAINE HUMAN RIGHTS COMMISSION IS PRESENTED NEITHER FOR NOR AGAINST LD 2063. THE REASON FOR THE COMMISSION'S TESTIMONY IS THAT THE PRINTED VERSION OF LD 2063 IN §17001 THROUGH §17004 CONTAINS LANGUAGE THAT IS ALREADY IN THE MAINE HUMAN RIGHTS ACT, THE STATE'S ANTI-DISCRIMINATION STATUTE, ENFORCED BY THE MAINE HUMAN RIGHTS COMMISSION. IT IS OUR UNDERSTANDING THAT THOSE PORTIONS OF LD 2063 WILL BE AMENDED OUT BY THE SPONSOR, SENATOR BARBARA GILL.

THE MAINE HUMAN RIGHTS ACT PROHIBITS DISCRIMINATION IN EMPLOYMENT, HOUSING, AND ACCESS TO PUBLIC ACCOMMODATIONS (AMONG OTHER AREAS) ON THE BASIS OF PHYSICAL HANDICAP (AMONG OTHERS).

AIDS CONSTITUTES A PHYSICAL HANDICAP UNDER THE MAINE HUMAN RIGHTS ACT.

> "PHYSICAL...HANDICAP MEANS ANY DISABILITY...CAUSED BY...DISEASE..." [5 M.R.S.A. §4553 (7-A)]

UNDER THE MAINE HUMAN RIGHTS ACT, IT IS UNLAWFUL TO DISCRIMINATE AGAINST ANYONE WHO HAS A PHYSICAL HANDICAP, HAS A RECORD OF SUCH HANDICAP, OR IS REGARDED AS HAVING A HANDICAP.

I WILL BE PLEASED TO ANSWER ANY QUESTIONS YOU MAY HAVE.